91-589

No. 91-

IN THE
Supreme Court of the United States
October Term, 1991

GAF CORPORATION,
Petitioner,
v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SIDNEY S. ROSDEITCHER
(Counsel of Record)
DAVID G. BOOKBINDER
THEODORE F. HAAS
ROBERT N. KRAVITZ
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Counsel for Petitioner

QUESTIONS PRESENTED

1. Should it be a rule of federal government contract law that the United States has no obligation to inform an "experienced producer" of a product purchased by the United States of the Government's knowledge at the time it contracts that the product is hazardous, even where the Government knows that, notwithstanding the contractor's experience as a producer, the contractor is unaware of the hazard?

2. Where the United States, in contracting to buy asbestos-containing insulation products, deliberately conceals its knowledge from the contractor that Government workers using the products are exposed to hazards of asbestos-related disease, affirmatively represents that such a hazard does not exist and knows that the contractor's experience in producing the product would not disclose the hazard, does the mere fact that the contractor is an "experienced producer" of the product relieve the United States of its obligation under federal government contract law to indemnify the contractor for massive costs it later incurs in suits by workers exposed to this hazard?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the petitioner GAF Corporation and the respondent the United States.

Petitioner GAF Corporation has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Page(s)

Page(s)

Statutes

Miscellaneous

IN THE

Supreme Court of the United States

October Term, 1991

GAF CORPORATION,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GAF Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered in the above-entitled proceeding on May 8, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reported at 932 F.2d 947, and is reprinted in the appendix hereto, p. 1a *infra*.

The orders of the Federal Circuit denying rehearing and declining suggestion for rehearing in banc are reprinted in the appendix hereto, pp. 48a and 50a *infra*.

The opinion of the United States Claims Court (Nettesheim, J.) is reported at 19 Cl. Ct. 490, and is reprinted in the appendix hereto, p. 18a *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1491(a)(1), petitioner brought this suit in the Claims Court. On February 12, 1990, the Claims Court granted respondent's motion for summary judgment. See pp. 18a, 47a *infra*.

On petitioner's appeal, the Federal Circuit, on May 8, 1991, entered a judgment and an opinion affirming the Claims Court's judgment. See pp. 1a, 16a *infra*. Petitioner filed a timely motion for rehearing and a suggestion for rehearing in banc. On June 11, 1991, the Federal Circuit denied the motion for rehearing, and on July 30, 1991 declined the suggestion for rehearing in banc. See pp. 48a, 50a *infra*.

On July 26, 1991, Chief Justice Rehnquist ordered that the time for filing this petition for writ of certiorari be extended to and including October 9, 1991.

The jurisdiction of this Court to review the judgment of the Federal Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case arises under the Tucker Act, 28 U.S.C. § 1491(a)(1). The issues presented for review involve the federal common law of contracts applicable to contracts between the United States and government contractors.

STATEMENT OF THE CASE

The petitioner, GAF Corporation, seeks review of a 2-to-1 decision of the Federal Circuit that establishes a novel rule of federal government contract law that permits the Government to deliberately conceal from government contractors information that affects the health and safety of third parties and exposes the contractors to enormous tort liabilities. In this case, the rule absolves the United States from any responsibility for deliberately concealing information from government contractors and the public

that, if disclosed, would have saved thousands of workers from asbestos-related diseases and the contractors from staggering costs, arising from suits by these workers, which have already bankrupted several major companies.

Under an established principle of federal government contract law known as the duty to disclose "superior knowledge," the United States must disclose to a government contractor facts known to the Government at the time it contracts that could vitally affect the contractor's costs, if the Government knows that the contractor is unaware of those facts. In this case, GAF claimed that the United States breached this duty when, beginning in 1944, it entered into a series of contracts with The Ruberoid Company (a company acquired by GAF in 1967) to buy asbestos-containing insulation for use on Government ships. GAF alleged that at the time of the contracts the Government deliberately concealed its knowledge that workers using these products in Government owned or supervised shipyards were exposed to the hazards of asbestos-related disease. GAF sued the United States in the Claims Court seeking recovery of the costs it incurred in thousands of litigations subsequently brought by shipyard workers exposed to these products, when the hazards concealed by the Government manifested themselves many years later.

The Claims Court granted summary judgment dismissing this claim, and a divided panel of the Federal Circuit affirmed.[1] The Federal Circuit majority never questioned that the Government knowingly concealed from Ruberoid its knowledge of the asbestos hazards to shipyard workers. The Federal Circuit majority held, however, that, as a matter of law, the superior knowledge doctrine does not impose a duty on the United States to inform an

---

[1] In addition to its superior knowledge claim, GAF also sought recovery on a warranty of specifications arising under *United States* v. *Spearin*, 248 U.S. 132 (1918), and, as to raw asbestos fiber Ruberoid purchased from the Government, on the warranties of merchantability and fitness. The Claims Court dismissed all GAF's theories, and the Federal Circuit unanimously affirmed as to the warranty of specifications and the warranties of merchantability and fitness. GAF does not seek certiorari with respect to these warranty theories.

"experienced producer" of a product purchased by the Government of the Government's knowledge that the product is hazardous to the health and lives of persons using the product on Government projects. The majority rested this rule on an irrebuttable presumption of law that the United States can never have reason to know that an experienced producer is unaware of the hazards of its own product. Thus the majority held:

> Ruberoid was an experienced asbestos supplier. Moreover, Ruberoid supplied its asbestos products to commercial as well as Government customers. Under those circumstances, the Government had no reason to believe that Ruberoid needed to learn more about asbestos hazards from its customer.

GAF Corp. v. *United States*, 932 F.2d 947, 949 (Fed. Cir. 1991), p. 5a *infra*.

By creating this irrebuttable presumption of law, the majority simply ignored the uncontradicted evidence, extensively marshalled in Judge Newman's dissent, showing that in this case the Government had to know that the hazard to shipyard workers using these products was not known to Ruberoid and would not have been disclosed by Ruberoid's experience as a manufacturer. 932 F.2d at 951-52, pp. 9a-11a *infra* (Newman, J., dissenting). GAF submitted affidavits that at the time of the contracts Ruberoid was not aware of the health hazard posed by finished asbestos products (App. at 441-42, 447).[2] GAF also submitted the affidavit of a medical expert (App. at 448-53) as well as the groundbreaking article of Dr. Selikoff and his colleagues (App. at 510),[3] which demonstrate that a risk of asbestos-related disease to users of

---

[2] "App." citations are to the Joint Appendix, dated October 11, 1990, filed with the Federal Circuit in the appeal of this case.

[3] It was the 1965 article of Dr. Irving Selikoff and his colleagues that established the connection between working with asbestos insulation products and asbestos-related disease. Selikoff *et al.*, *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 Ann. N.Y. Acad. Sci. 139 (1965).

finished asbestos insulation products was not recognized in the scientific community until the mid-1960's and that such a risk could not have been inferred from prior knowledge of an asbestos hazard in the manufacturing process. Most important, GAF submitted the Fleischer-Drinker Report, written by Navy personnel and published with the Navy's permission in 1946,[4] that contained two statements of the utmost significance to this case. After examining asbestos insulation workers at a number of shipyards, both government and private, the authors concluded:

> The character of asbestos pipe covering industry on board naval vessels is such that conclusions drawn from other asbestos industries such as textiles, cannot be applied.
>
> [I]t may be concluded that such pipe covering [with asbestos insulation] is not a dangerous occupation.

(App. at 509) Thus, the Government assured the public that, from the standpoint of health, asbestos insulation work in shipyards was different from the manufacture of asbestos products, that experience of occupational risks in asbestos manufacture did *not* support an inference of an occupational risk in shipyard insulation work, and that asbestos insulation work in shipyards was *not* a dangerous occupation. 932 F.2d at 952, p. 11a *infra* (Newman, J., dissenting).

GAF also submitted extensive evidence showing that, notwithstanding what it was telling the public in the Fleischer-Drinker Report, the Government was conducting classified tests on the employees of its own shipyards and of private shipyards that disclosed that these workers were exposed to a substantial asbestos

---

[4] Fleischer, Viles, Gade & Drinker, *A Health Survey of Pipe Covering Operations in Constructing Naval Vessels*, 28 J. Ind. Hyg. & Tox. 9 (1946).

health hazard. App. 505-07, 518-32; 932 F.2d at 951-52, pp. 9a-11a *infra* (Newman, J., dissenting). In Judge Newman's words, the evidence showed:

> [T]he government monitored the health hazards, knew of the significant health risk to which it knowingly exposed its employees, classified the results as a military secret, and released misleading public information in its stead.

932 F.2d at 953, p. 12a *infra* (Newman, J., dissenting). Notwithstanding this evidence, the Federal Circuit majority's "experienced producer" exception to the superior knowledge doctrine enabled it to resolve, as a matter of law, the quintessentially factual question of the Government's knowledge of Ruberoid's ignorance of the health hazard to shipyard workers.

The Federal Circuit majority characterized its "experienced producer" exception as merely an application of its earlier decision in *Lopez* v. *A.C.& S., Inc.*, 858 F.2d 712 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 904 (1989). Thus in framing its holding, the majority stated:

> This court in *Lopez* reasoned that the superior knowledge doctrine does not impose on a customer a duty to inform an experienced producer that its products are hazardous.

932 F.2d at 949, pp. 4a-5a *infra*. But as Judge Newman shows in her dissent, producer experience had never before been considered sufficient to defeat liability under the superior knowledge doctrine. As Judge Newman states, *Lopez* stands for no "general rule" barring "experienced producers" from asserting superior knowledge claims. 932 F.2d at 951, p. 9a *infra* (Newman, J., dissenting).[5]

---

[5] In *Lopez*, the Federal Circuit affirmed a district court's dismissal, on a motion directed to the pleadings, of third-party claims by two asbestos manufacturers against the United States brought under the Little Tucker Act, 28 U.S.C. § 1346(a)(2).

Under *Lopez*, as under prior superior knowledge cases, even an experienced government contractor is entitled to submit evidence that the Government was aware of the contractor's ignorance of the particular hazard involved. In Judge Newman's words:

> GAF... was entitled to establish the actual factual situation, for in *Lopez* the court did not hold that there was no version of the issue of superior knowledge that could support any of GAF's contract theories.

932 F.2d at 951, pp. 8a-9a *infra* (Newman, J., dissenting).

Thus, the majority applied a wholly novel rule of federal government contract law to foreclose GAF from a trial on its claims that the Government was responsible for the asbestos tragedy inflicted on shipyard workers, even though, as Judge Newman pointed out, the Government's own internal documents

> raise[] factual questions which, if found in accordance with GAF's position, support GAF's argument that the hazardous nature of the Navy's usage of asbestos products was not generally known, that the Navy's knowledge was superior, and that it was withheld at the time the contract with Ruberoid was entered into and performed.

932 F.2d at 952, p. 11a *infra* (Newman, J., dissenting).

REASONS FOR GRANTING THE WRIT

The rule announced by the Federal Circuit is an unprincipled departure from prior government contract law. The contractor's experience has never before precluded a showing that the Government knew the contractor was unaware of facts withheld by the Government or excused the Government's obligation to disclose its superior knowledge.

The novel "experienced producer" exception established by the Federal Circuit case has an enormous impact: it relieves the United States of any responsibility for the immense costs incurred as a result of asbestos claims by shipyard workers, notwithstanding the compelling evidence that the United States knowingly exposed these workers to asbestos hazards which it deliberately concealed from unwary contractors and the public. Claims based on asbestos-related diseases suffered by these workers comprise a substantial part of the tens of thousands of asbestos claims now inundating state and federal courts. The Federal Circuit's new rule thus insures that private industry will have to bear alone these enormous costs which could have been averted by the Government's candor.

Moreover, the impact of the rule extends well beyond the asbestos crisis. It establishes a rule for all government supply contracts. Because the Government will almost invariably contract with "experienced producers," the rule entirely eliminates the Government's obligation to disclose its knowledge that products for which it contracts cause illness or death, even where the evidence shows that, notwithstanding the contractor's "experience," the Government knew the contractor was unaware of that fact.

The Federal Circuit is the sole interpreter of federal government contract law, subject only to review by this Court.[6] Absent review by this Court, the Federal Circuit's formulation of government contract law becomes national policy, without any possibility of conflicting interpretations by other federal or state courts.[7] Certiorari should be granted to review a rule which not only departs from established government contract law but conflicts

---

[6] Contract actions against the United States for more than $10,000 must be brought in the Claims Court, 28 U.S.C. § 1491(a)(1), from which appeals must be taken to the Federal Circuit. 28 U.S.C. § 1295(a)(3). Contract actions against the United States for less than $10,000 may be brought in District Court, 28 U.S.C. § 1346(a)(2), but, here too, appeals must be taken to the Federal Circuit. 28 U.S.C. § 1295(a)(2); *United States* v. *Hohri*, 482 U.S. 64 (1987).

[7] Cases arising from contracts of the United States are decided under federal common law. *United States* v. *County of Allegheny*, 322 U.S. 174, 183 (1944); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-67 (1943).

with important national policies of health and safety and forecloses a just allocation of responsibility for the nation-wide asbestos crisis.

I

THE WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE RULE OF FEDERAL GOVERNMENT CONTRACT LAW ANNOUNCED BY THE FEDERAL CIRCUIT EXPOSES CONTRACTORS TO SIGNIFICANT LIABILITIES AND EXPOSES THE PUBLIC TO SEVERE HEALTH RISKS, BOTH OF WHICH COULD EASILY BE AVOIDED BY GOVERNMENT DISCLOSURE WHEN IT HAS SUPERIOR KNOWLEDGE.

The Federal Circuit's "experienced producer" exception is a departure from the established superior knowledge doctrine. This departure has truly pernicious consequences. It encourages the Government to deliberately conceal from the unwary contractor product liability risks which greatly increase the real cost of contract performance, and it exposes third parties to health and safety hazards that could have been avoided if the Government had disclosed them to the contractor.

It is fundamental that the United States may not misrepresent material facts affecting its contractor's potential costs. If it does so, it may be sued under the Tucker Act, 28 U.S.C. § 1491(a)(1). *United States* v. *Atlantic Dredging Co.*, 253 U.S. 1 (1920); *Christie* v. *United States*, 237 U.S. 234 (1917). It is equally fundamental that even where the United States does not affirmatively misrepresent material facts, it nevertheless has a duty under government contract law to disclose its knowledge of facts that vitally affect its contractor's costs if the United States is aware that the contractor is ignorant of them. *Helene Curtis Industries, Inc.* v. *United States*, 160 Ct. Cl. 437, 312 F.2d 774 (1963). This duty to disclose "superior knowledge" simply reflects a principle

of fair dealing owed by the Government to its contractors. As the court explained in *Helene Curtis*:

> Although it is not a fiduciary toward its contractors, the Government—where the balance of knowledge is so clearly on its side—can no more betray a contractor into a ruinous course of action by silence than by the written or spoken word.

160 Ct. Cl. at 444, 312 F.2d at 778.

The superior knowledge doctrine is well established: its jurisprudence stretches over several decades; its elements are settled[8]; and it has been applied in various contexts. *See, e.g., Petrochem Services, Inc.* v. *United States*, 837 F.2d 1076 (Fed. Cir. 1988) (extent of oil spill); *Hardeman-Monier-Hutcherson* v. *United States*, 198 Ct. Cl. 472, 458 F.2d 1364 (1972) (weather conditions at construction site); *Aerodex, Inc.* v. *United States*, 189 Ct. Cl. 344, 417 F.2d 1361 (1969) (availability of component parts); *J.A. Jones Construction Co.* v. *United States*, 182 Ct. Cl. 615, 390 F.2d 886 (1968) (availability of labor).

In this case, the Federal Circuit held that the doctrine does not apply to require the Government to disclose product hazards to

---

[8] The Federal Circuit reiterated those elements in the present case:

> "To show a breach under the superior knowledge doctrine, a contractor claiming a breach by non-disclosure must produce specific evidence that it
>
> > (1) undert[ook] to perform without vital knowledge of a fact that affects performance costs or direction, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.
>
> *Lopez*, 858 F.2d at 717 (citing *American Ship Bldg. Co. v. United States*, 228 Ct. Cl. 220, 654 F.2d 75 (1981))."

932 F.2d at 949, p. 4a *infra*.

"experienced producers" of those products. This "experienced producer" exception, however, is a marked departure from existing law. The Government attempted to establish just such a defense in *Helene Curtis* itself, and it was rejected. In its brief in that case, the Government argued:

> Plaintiff is not an amateur in the chemical field, nor in Government contract work, and the Government in this case was contracting for their know-how and manufacturing ability, not merely contracting to have them follow prescribed procedures in a workmanlike manner .... The Government is entitled to rely on the contractor's technical ability to perform a contract... . Helene Curtis was not a neophyte when it undertook these contracts.

Government's Brief at 57, *Helene Curtis*. The superior knowledge doctrine does not protect only amateurs and neophytes, however. While recognizing that Helene Curtis possessed experience in the compounding and packaging of chemicals, 160 Ct. Cl. at 439, 312 F.2d at 775, the Court of Claims did not erect that experience as a bar to recovery. It found that the Government was aware that, notwithstanding the contractor's manufacturing experience, it did not know of the manufacturing difficulties that the Government had failed to disclose.

In the present case, the Federal Circuit majority ignored *Helene Curtis* and stated that its more recent decision in *Lopez* supported its "experienced producer" exception to the "superior knowledge" doctrine. As Judge Newman's dissent points out, however, *Lopez* stands for no such "general rule." 932 F.2d at 951, p. 8a *infra* (Newman, J., dissenting). *Lopez* merely treats contractor experience as creating a *rebuttable* presumption:

> Since the government is entitled to presume that one who bids on a government invitation knows his own capabilities and has ascertained he will be able to produce, and at what cost, *it would be up to the*

> *contractor, complaining of a breach by nondisclosure, to produce specific information to back up his contention.*

858 F.2d at 717 (emphasis added); *see* 932 F.2d at 953, p. 12a *infra* (Newman, J., dissenting).

Lopez quite plainly permits the contractor to "produce specific information to back up his contention" and establish its superior knowledge claim. In this case, as Judge Newman's dissent shows, GAF did produce very specific information to back up its contention. That evidence, none of which was contradicted, showed that the Government admittedly was aware that Ruberoid's experience as a manufacturer would not have disclosed the hazard to shipyard workers using finished asbestos products; the Government deliberately concealed its knowledge of that hazard in classified studies; and the Government then misled the public by reassuring it that the hazard did not exist. This evidence was more than sufficient to support an inference that the Government had to know that Ruberoid was unaware of the hazard so painstakingly concealed by the Government; it surely raised issues of fact that could not have been resolved without a trial. 932 F.2d at 951-54, pp. 9a-15a *infra* (Newman, J., dissenting).

The Federal Circuit's reliance on "contractor experience" was especially unwarranted in this case. For here, the contractor's experience as a producer was irrelevant to the hazard involved—a hazard to shipyard workers using the product while employed by Government shipyards or by Government-supervised private shipyards, in the construction or repair of Government ships.[9] The Government was therefore able to conduct studies of these workers,

---

[9] The majority, in the first paragraph of its opinion, stated that GAF incurred liabilities as a result of injuries to "*Ruberoid's* shipyard workers." 932 F.2d at 948, pp. 1a-2a *infra* (emphasis added). The reference to Ruberoid is obviously an inadvertent error in the opinion. Ruberoid had no shipyard workers. It has always been clear that this case seeks indemnification for costs incurred to workers employed by the Government or by Government-supervised shipyards. 932 F.2d at 953, p. 12a *infra* (Newman, J., dissenting); (App. at 44).

which disclosed the hazard and which the Government classified as a military secret. 932 F.2d at 952, p. 10a *infra* (Newman, J., dissenting). In these circumstances, it was the Government—and not Ruberoid—that had all the relevant experience concerning the hazard which asbestos-containing products posed to users such as shipyard workers.

Hence, the "experienced producer" exception makes no sense. To create such an exception to permit the Government to conceal product hazards is simply perverse. If ever there is a circumstance requiring a duty to disclose superior knowledge, it is where the Government possesses unique knowledge of a product hazard. Concealment of a fact such as manufacturing difficulties normally will only affect the costs of a single contract. The concealed difficulty will become manifest while the contractor is attempting to fulfill the contract, and the contractor will not enter future contracts on the same misconception. In cases involving product hazards, however, the concealed hazard may not manifest itself as a disease until many years later, and the contractor—like the contractor in this case—may be induced to enter into numerous contracts, exposing the contractor to staggering liabilities based on claims by thousands of third parties injured over a long course of time.

More importantly, the "experienced producer" exception created by the Federal Circuit for product hazards eliminates the Government's obligation to disclose superior knowledge in the very circumstance where candor is most essential, for the cost of concealment is measured not simply in accounting terms, but in ruined health and premature deaths.

Supreme Court review is needed, therefore, to determine whether to allow the adoption of a rule of federal government contract law that is so subversive to fair dealing and the protection of public health and safety.

II

THE WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE RULE OF FEDERAL GOVERNMENT CONTRACT LAW ANNOUNCED BY THE FEDERAL CIRCUIT PRECLUDES A FAIR RESOLUTION OF THE ASBESTOS CRISIS.

The stakes in this case are enormous.

The rule established by the Federal Circuit forecloses any trial of claims that the Government is obligated to indemnify contractors for the settlements, judgments and other costs of litigations brought by shipyard workers exposed to asbestos-containing insulation products purchased by the Government for use on Government ships.[10] Claims by shipyard workers comprise a substantial portion of the tens of thousands of claims based on exposure to asbestos. GAF alone has been named in 147,000 cases (closed and pending) of which 29% are shipyard cases. In addition, the Center for Claims Resolution ("CCR")[11] has data on some 166,000 filings (closed and pending) of which 28% are

---

[10] GAF's case was one of several contract actions against the United States brought by asbestos manufacturers in the Claims Court. The other Claims Court cases so far have run aground for jurisdictional reasons based on 28 U.S.C. § 1500, which bars Claims Court jurisdiction if actions on the same claim are already pending in other courts. After trial, a judgment adverse to Johns-Manville was vacated by the Federal Circuit on these jurisdictional grounds because of claims it previously filed in federal district courts for contribution under the Federal Tort Claims Act. *Johns-Manville Corp.* v. *United States*, 13 Cl. Ct. 72 (1987), *vacated*, 855 F.2d 1571 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989). A similar jurisdictional attack was made on the remaining cases. The Claims Court dismissed all of these cases except GAF's. A panel decision reversing these dismissals has been vacated and rehearing in banc was granted, and the case is *sub judice*. *Keene Corp.* v. *United States*, 17 Cl. Ct. 146 (1989), *rev'd*, 911 F.2d 654 (Fed. Cir. 1990), *vacated, opinion withdrawn, and rehearing in banc granted*, 926 F.2d 1109 (Fed. Cir. 1990).

[11] CCR is a non-profit corporation with 19 members including GAF, organized to administer and arrange for evaluation, settlement, payment, and defense of asbestos-related bodily injury claims.

shipyard cases.[12] Thus it is apparent that costs attributable to shipyard claims will comprise a substantial portion of the enormous costs attributable to the universe of asbestos claims. Yet, despite the compelling evidence of the Government's responsibility for shipyard claims, the Federal Circuit's decision enables the Government to escape all liability for these costs and compels private companies and their insurers to continue to bear the burden alone.[13]

This injustice has serious economic consequences for the companies and the claimants. The Judicial Conference Ad Hoc Committee on Asbestos Litigation recognized that the financial stress of the nationwide asbestos litigation has widespread economic effects:

> The enormous costs associated with asbestos litigation affect not only the parties but com-

---

[12] A Rand study of 513 asbestos related claims closed between January 1980 and August 1982 found that shipyard workers accounted for 37% of all closed claims. J. Kakalik *et al.*, *Variation in Asbestos Litigation Compensation and Expenses* (R-3132-ICJ) (1984).

[13] The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 ("FTCA"), until now has not provided asbestos manufacturers an avenue of redress. Five circuits have rejected on purely legal grounds, without reaching the underlying merits, manufacturers' claims for contribution and indemnity against the Government under the FTCA for the Government's negligence in connection with both Government and private shipyards. *See, e.g.*, *Bush* v. *Eagle-Picher Indus., Inc.*, 927 F.2d 445 (9th Cir. 1990) (Government shipyard); *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986)(Government shipyard); *In re All Maine Asbestos Litigation (BIW Cases)*, 581 F. Supp. 963 (D. Me. 1984), 651 F. Supp. 913 (D. Me. 1986), 655 F. Supp. 1169 (D. Me. 1987), *aff'd*, 854 F.2d 1328 (Fed. Cir. 1988) *(per curiam)* (private shipyard); *Eagle-Picher Indus., Inc.* v. *United States*, 937 F.2d 625 (D.C. Cir. 1991) (affirming dismissal of GAF's and Eagle-Picher's federal-law based contribution claims in connection with Government's negligence in Government shipyards, but remanding for consideration of whether cause of action exists under laws of several states). GAF's claims for contribution in connection with the Government's negligence in private shipyards are pending in the federal district court for the District of Columbia; the Government has asserted it will seek their dismissal based on cases like *In re All Maine Asbestos Litigation (BIW Cases*, *supra*, and *Shuman* v. *United States*, 765 F.2d 283 (1st Cir. 1985).

> munities and other individuals across the nation. Among the approximately 25 major asbestos defendants, 11 have filed for bankruptcy. These corporations employ thousands of workers and have plants throughout the United States.

Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 14 (1991).

Moreover, questions have been raised as to whether private resources will be sufficient to pay for the universe of existing and future asbestos claims. Judge Weinstein has said:

> Overhanging [the] massive failure by the present system [of resolving asbestos-related claims] is the reality that there is not enough money available from traditional defendants to pay for current and future claims.

In re Joint Eastern and Southern District Asbestos Litigation, Civil Class Action No. 90-3973, slip op. at 66, 1991 U.S. Dist. LEXIS 9128 (E. & S.D.N.Y. June 27, 1991) (Weinstein, J.).

The question of whether the Government is obligated to compensate contractors for the substantial portion of the claims arising from suits by shipyard workers is thus of monumental importance. It not only will affect the economic well being of these private companies and the individuals dependent on them, but it may affect the extent to which asbestos claimants will be paid. If the Government is held responsible for the liabilities resulting from the hazards it concealed, there will be substantial additional resources available to private companies to compensate victims.

Supreme Court review is needed to determine whether the Federal Circuit's "experienced producer" exception, which absolves the United States of this responsibility without a trial, should be permitted to stand.

CONCLUSION

The "experienced producer" exception to the Government's obligation to disclose its superior knowledge of product hazards raises an important issue of federal government contract law affecting contractor costs, health and safety, and the just resolution of the asbestos crisis. GAF submits that it merits review by this Court and, therefore, requests that certiorari be granted.

Respectfully submitted,

SIDNEY S. ROSDEITCHER
(Counsel of Record)
DAVID G. BOOKBINDER
THEODORE F. HAAS
ROBERT N. KRAVITZ
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Counsel for Petitioner

October 9, 1991

APPENDIX

GAF CORPORATION,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

No. 90-5079

United States Court of Appeals,
Federal Circuit.

May 8, 1991.

Rehearing Denied June 11, 1991.

Suggestion for Rehearing In Banc
Declined July 30, 1991.

Sidney S. Rosdeitcher, Paul, Weiss, Rifkind, Wharton & Garrison, New York City, argued for plaintiff-appellant. With him on the brief, were David G. Bookbinder, Theodore F. Haas and Robert N. Kravitz. David S. Fishback, Asst. Director, Torts Branch, Civ. Div., Dept. of Justice, Washington, D.C., argued for defendant-appellee. With him on the brief, were Stuart M. Gerson, Asst. Atty. Gen., J. Patrick Glynn, Director, Eric D. Goulian and Christina M. Humway, Trial Attys.

Before RICH, NEWMAN, and RADER, Circuit Judges.

RADER, Circuit Judge.

In 1944, GAF Corporation's (GAF) predecessor, the Ruberoid Company (Ruberoid), entered contracts with the United States Navy (Navy) to insulate ships with asbestos products.

Ruberoid's shipyard workers contracted asbestosis. GAF incurred substantial liability for injuries and death due to these workers' exposure to asbestos.

GAF sued in the United States Claims Court seeking indemnification from the Government for its liabilities. GAF contended that the Navy knew in the 1940s of the health risks of asbestos and deliberately withheld that information from Ruberoid. The Claims Court granted summary judgment dismissing GAF's claims. *GAF Corp.* v. *United States*, 19 Cl. Ct. 490 (1990) (*GAF Corp.*). The Claims Court determined that the Navy had no contractual duty to warn an asbestos producer of hazards in its product. GAF appealed. This court affirms.

BACKGROUND

In 1930, Ruberoid acquired controlling interest in Eternit, a firm which manufactured asbestos building materials. At the time of the acquisition, Eternit's employees had sued the company for injuries caused by exposure to a variety of dusts, including asbestos dust. Ruberoid settled several of these suits. Due to these suits, Ruberoid took steps to protect its workplaces against occupational hazards. From 1930 until the mid-1960's, Ruberoid experienced only two similar worker claims. In 1967, GAF acquired Ruberoid by merger.

In the early 1940s, Ruberoid developed a product called Calsilite to insulate Navy ships. Calsilite contained asbestos. Beginning in 1944 and stretching over two more decades, the Navy bought Calsilite from Ruberoid. Over this period, shipyard workers installed, repaired, and replaced Ruberoid's Calsilite.

From June to August 1947, Ruberoid purchased raw asbestos fiber from the Reconstruction Finance Corporation, a Government entity. The purchase contracts contained no express warranties nor disclaimers of warranties. In 1951, the Defense Minerals Exploration Administration (DMEA) subsidized Ruberoid's exploration for raw asbestos fiber. The exploration subsidy contract contained no warranties about the safety of asbestos products.

Due to prolonged contact with the asbestos, many shipyard workers contracted deadly diseases. These workers filed wrongful death and personal injury tort claims against GAF. GAF incurred substantial costs in judgments, settlements, and legal fees.

In 1983, GAF filed a Tucker Act claim (28 U.S.C. § 1491 (1982) against the United States in the Claims Court. At the same time, several other asbestos producers filed suits. The Claims Court tried another company's action ahead of GAF's claim. *Johns-Manville* v. *United States*, 13 Cl. Ct. 72 (1987). This court vacated that judgment on jurisdictional grounds. *Johns-Manville* v. *United States*, 855 F.2d 1571 (Fed. Cir. 1988). On the same day, this court affirmed a district court's dismissal of a similar Little Tucker Act claim (28 U.S.C. § 1346(a)(2) (1982). *Lopez* v. *A.C. & S. Inc.*, 858 F.2d 712 (Fed. Cir. 1988), *cert. denied*, *sub. nom. Eagle-Picher Ind., Inc.* v. *United States*, 491 U.S. 904, 109 S. Ct. 3185, 105 L. Ed. 2d 694 (1989).

Arguing that GAF's complaint raised the same questions resolved by this court in *Lopez*, the Government moved for summary judgment. The Claims Court granted the Government's motion and dismissed GAF's complaint. The Claims Court presents a complete recitation of the facts of this case. *GAF Corp.*, 19 Cl. Ct. at 494-96.

DISCUSSION

GAF contends that the Claims Court committed three reversible errors. First, GAF faults the Claims Court for denying a trial on whether the Government breached a duty to disclose "superior knowledge" of asbestos hazards. GAF also criticizes the Claims Court for denying a trial on whether the Government breached an implied warranty of specifications for Calsilite insulation. Finally, GAF contends that the Claims Court wrongly dismissed for lack of jurisdiction its claim that the Government breached an implied warranty on the raw asbestos sold by the Government to Ruberoid.

Superior Knowledge

This court has set forth principles governing claims that the Government knew of asbestos hazards but withheld that knowledge from an unwary asbestos producer. *Lopez*, 858 F.2d at 717.[1/] This "superior knowledge" doctrine can, in limited circumstances, supply the basis for a breach of contract. To show a breach under the superior knowledge doctrine, a contractor claiming a breach by non-disclosure must produce specific evidence that it

> (1) undert[ook] to perform without vital knowledge of a fact that affects performance costs or direction, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

Lopez, 858 F.2d at 717 (citing *American Ship Bldg. Co.* v. *United States*, 228 Ct. Cl. 220, 654 F.2d 75 (1981)).

In a prior asbestos case, a five-judge panel of this court assumed "the government did know things it did not reveal, and that it used a defective product in ways that added to the hazard, but were not known to the suppliers." *Lopez*, 858 F.2d at 717. Nonetheless in *Lopez* this court discerned no reason the trial court should have applied the superior knowledge doctrine. This court determined that the asbestos producers could not satisfy the second element of the superior knowledge doctrine. The Government had no reason to believe experienced asbestos producers lacked knowledge of the product's risks.

This court in *Lopez* reasoned that the superior knowledge doctrine does not impose on a customer the duty to inform an

---

[1/] GAF participated in *Lopez* v. *A.C. & S. Inc.*, 858 F.2d 712 (Fed. Cir. 1988) as an *amicus curiae*.

experienced producer that its products are hazardous. *Lopez*, 858 F.2d at 717-18. In *Lopez* the court noted that the "caselaw dealing with a government breach of a contract by non-disclosure of superior knowledge cannot be made to support the claims here in suit without so drastic a restructuring that we would be engaging in judicial legislation." *Lopez*, 858 F.2d at 718. GAF, like the asbestos producers in *Lopez*, in effect asserted "not only a duty of the customer to inform the supplier that his product is defective, but a duty to find out what he [the supplier] does not already know." *Id.* This additional duty does not "fit" the superior knowledge doctrine. *Id.* at 717-18. Indeed the doctrine does not impose on a buyer an affirmative duty to inquire into the knowledge of an experienced seller.

The Claims Court found that the Government had no reason to believe that Ruberoid lacked knowledge about asbestos hazards. *GAF Corp.*, 19 Cl. Ct. at 497. Ruberoid was an experienced asbestos supplier. Moreover, Ruberoid supplied its asbestos products to commercial as well as Government customers. Under those circumstances, the Government had no reason to believe that Ruberoid needed to learn more about asbestos hazards from its customer. GAF stumbles on the same hurdles in the superior knowledge doctrine that the producers in *Lopez* could not surmount. Construing factual inferences in GAF's favor, the Claims Court correctly determined that GAF's showings did not create a triable issue. *GAF Corp.*, 19 Cl. Ct. at 497, 498-99 n.2.

Implied Warranty of Specifications

This court has also set forth principles governing implied warranties of specifications under the Tucker Act. This court acknowledged that an implied warranty requires "circumstances strongly support[ing] a factual inference that a warranty was implied." *Lopez*, 858 F.2d at 715. This inference may arise only when the Government's specifications tell a contractor "just how to do the job." *Id.* at 716. An implied-in-fact warranty does not arise when the Government merely "specified any characteristic at all in the merchandise it purchased." *Id.* at 715. In *Lopez*, this court did not detect any signs of extensive Government intrusion into the

asbestos production process which might suggest that the Government intended to warrant the product's safety. This court stated, "[i]t would be just as reasonable for the parties to the sale to have implied a warranty by the seller, that apart from dangers the seller warned of, the insulation would not endanger the buyer or its employees. Either way it would be a warranty implied in law, not fact." *Lopez*, 858 F.2d at 716.

Under Claims Court summary judgment rules, the Government provisionally conceded that Ruberoid's contracts contained design specifications. According to GAF, the Government's use of design specifications would suggest sufficient Government control to support an implied warranty.

The Claims Court, however, found that GAF showed no differences between specifications on Ruberoid's commercial products and specifications on its products sold to the Government. In *Lopez*, this court noted the significance of that showing to an inference of an implied warranty. *Id.* at 715-16.

The Claims Court found that GAF did not show that Ruberoid's Government products differed in any material respect from its commercial products. *GAF Corp.*, 19 Cl. Ct. at 497. The Government contract specifications requested the type of asbestos products Ruberoid supplied to the public in general. Under those circumstances, the Government had no reason to suppose it needed to provide Ruberoid with a warranty on Ruberoid's own commercial products. The factual circumstances at the time of contracting do not support an inference that the Government intended—though not in writing—to indemnify Ruberoid for any injuries from Ruberoid's own products.

GAF relies on three cases to suggest buyers may extend implied warranties to sellers. *United States* v. *Spearin*, 248 U.S. 132, 39 S. Ct. 59, 63 L. Ed. 166 (1918); *Ordnance Research, Inc.* v. *United States*, 221 Ct. Cl. 641, 609 F.2d 462 (1979); and *Blount Bros. Corp.* v. *United States*, 872 F.2d 1003 (Fed. Cir. 1989). In *Lopez*, this court distinguished a "mere supply contract," like Ruberoid's, from a "construction contract with its massive detail all prescribed by the owner," like Spearin's. *Lopez*, 858 F.2d at 715.

These cases, however, bolster the Claims Court's holding that the parties implied no warranty of specifications. In each of these three cases, the contractor could do nothing short of violating the specifications to avoid its losses. The specifications themselves caused the losses. Those unique specifications and circumstances warranted the inference that the Government in fact intended to provide a warranty. Ruberoid, on the other hand, incurred liability for failure to place warnings on its products. *GAF Corp.*, 19 Cl. Ct. at 503. Nothing in the contract specifications prevented Ruberoid from putting warnings on its products. These asbestos supply contract specifications, whether design or performance, did not cause Ruberoid's tort losses. Thus, this case differs from *Spearin*, *Ordnance*, and *Blount Bros.*

Thus, the specifications in Ruberoid's contract, whether design or not, do not alter the reasoning of *Lopez*. GAF did not distinguish Ruberoid's commercial from its Government products. The case law invoked by GAF does not support an implied warranty in this case. As noted by the Claims Court, the circumstances of Ruberoid's transactions with the Government do not create a triable issue on the implied warranty question. *GAF Corp.*, 19 Cl. Ct. at 497.

Warranty of Merchantability and Fitness

The Government sold Ruberoid raw asbestos fiber from Government stockpiles in 1947. These sales were simple transactions containing no express warranties. GAF faults the Claims Court for refusing to incorporate into these contracts the Uniform Commercial Code's warranties of merchantability and fitness.

Congress has not applied the Uniform Commercial Code to federal contracts. Hawkland, *UCC Series* § 1-101:01, pp. 3-4. The Claims Court may not do so by judicial fiat what Congress has not done by legislation. The trial court may not enforce a warranty implied-in-law. The Tucker Act does not grant the Claims Court jurisdiction to enforce contracts implied-in-law. *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 & n.5, 100 S. Ct. 647,

650 & n.5, 62 L. Ed. 2d 614 (1980); *Lopez*, 858 F.2d at 714-15. The Claims Court correctly dismissed this claim.

CONCLUSION

Based on *Lopez*, the Claims Court dismissed GAF's case. GAF did not show that the Claims Court committed any reversible error. Therefore, the judgment of the Claims Court is

AFFIRMED.

PAULINE NEWMAN, Circuit Judge, dissenting.

But for an asserted material factual distinction from the premises of our decision in *Lopez* v. *A.C. & S. Inc.* 858 F.2d 712 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 904, 109 S. Ct. 3185, 105 L. Ed. 2d 694 (1989), I share the view that the *Lopez* decision bars relief for GAF under the Tucker Act. However, on motion for summary judgment the nonmovant's assertions of fact must be taken as true if adequately supported, and summary disposition is improper unless, despite the nonmovant's view of the facts, judgment must be rendered against it as a matter of law. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Unlike the factual record developed in *Lopez*, GAF has proffered evidence that shows, on its face, that at the time the government contracted with Ruberoid the Navy actively suppressed knowledge that was significantly superior to that available from any other source, and instead allowed misleading information to be published. In addition, GAF has proffered affidavit evidence positively averring Ruberoid's lack of knowledge as to hazardous conditions created by the Navy's misuse of asbestos products, and other evidence giving rise to inferences that Ruberoid could and would have taken steps to protect itself from this added risk. The court in *Lopez* did not establish a general rule that encompasses these facts. GAF thus was entitled to establish the actual factual situation, for in *Lopez* the court did not hold that there was no version of the issue of superior knowledge that could support any

of GAF's contract theories. Thus I believe that summary judgment in favor of the United States was improvidently granted.

A

GAF supported its argument with previously classified government documents. For example, there is a memorandum dated March 11, 1941 from Commander C.S. Stephenson, Chief of the United States Navy Division of Preventive Medicine, to Admiral McIntire:

> None of our foundries would pass the necessary inspection to obtain workman's compensation insurance from any of the insurance organizations. I doubt if any of our foundries would be tolerated if the State industrial health people were to make surveys of them. Repeated recommendations have been made by the medical officers attached to these yards that studies be made on dust concentrations and steps be taken to remedy this condition.

Commander Stephenson expressed concern about the Navy's "protecting the men as we should":

> Asbestosis. We are having a considerable amount of work done in asbestos and from my observations I am certain that we are not protecting the men as we should. This is a matter of official report from several of our Navy Yards.

In a March 4, 1941 memorandum Commander Stephenson referred to "possible labor unrest" if inspectors were allowed to observe the conditions in the Navy Yards. GAF also cites a report on the Bath (Maine) Iron Works in 1942, that describes the cutting and pounding of asbestos insulation to fit pipes in Navy ships:

> The conditions in this shop present a very real asbestos hazard and immediate steps should be

> taken to segregate the most dusty processes into a well ventilated area.

A 1944 classified report on the Bath Iron Works stated that 12 out of 38 workers that were X-rayed showed significant signs of exposure to dust, and four were diagnosed as having asbestosis.

A 1943 report on the shipbuilding facilities at Seattle, Washington stated:

> Most of the dust that escapes from the cutting operations finds its way eventually to the rafters overhead where it is thickly settled. Frequent removal of this dust is not practiced.

A 1944 report described conditions at the Defoe Shipbuilding facility at Bay City, Michigan:

> Amosite contains a considerable percentage of asbestos and studies have shown that dust from it, if breathed in sufficient quantity for a prolonged period, are capable of causing the disabling occupational disease, asbestosis, which is similar in its effects to silicosis.

The papers and others were classified under the Espionage Act, making it a criminal offense to reveal their content.

While the *Lopez* court had some of these classified documents before it, GAF's evidence goes much further in support of its position that the government's knowledge of the hazards and consequences of exposure to asbestos, and of the conditions in which it was used by the Navy, was superior to that known to manufacturers of asbestos. Affidavits of record state that although the manufacturers were aware of health hazards due to exposure during manufacture of asbestos products, it was not generally known until the 1960s that the general use of these products posed a similar hazard. Indeed, in distinction from the government's classified reports, GAF points to the "Fleischer-Drinker Report",

released by permission of the Navy in 1946, that downplayed the hazards of asbestos use in the Navy:

> The character of asbestos pipe covering industry on board naval vessels is such that conclusions drawn from other asbestos industries such as textiles, cannot be applied.
>
> The report stated:
>
> The incidence of asbestosis among pipe coverers in the shipyards studied was low... In view of the nature of shipyard pipe covering work, this low incidence is not surprising.

The apparent conflict between this publication and the Navy's internal documents raises factual questions which, if found in accordance with GAF's position, support GAF's argument that the hazardous nature of the Navy's usage of asbestos products was not generally known, that the Navy's knowledge was superior, and that it was withheld at the time the contract with Ruberoid was entered into and performed. This additional supporting evidence was not presented in *Lopez* by any party, or by GAF in its brief *amicus curiae*.

In *Lopez* the court assumed that the government knew things it did not disclose, and that it used the asbestos in a way that added to the hazard, but concluded that "[t]he government might reasonably suppose Raymark and Eagle-Picher knew enough about asbestos and its perils not to need to learn more about it from the government." 858 F.2d at 717. However, *Lopez* was decided on the basis of the allegations in the complaints of Raymark and Eagle-Picher, which were directed primarily to implied warranty theories under the Tucker Act and breach of duty theories under the Federal Tort Claims Act. The government's supplemental brief in *Lopez* states that an alleged breach of duty to disclose superior knowledge "was not asserted in the complaint before the district court below." *Lopez*, Govt. Supp. Brf. at 14 n.11. The superior knowledge theory now pressed by GAF was not before the *Lopez* court, and the

matter of relative knowledge of the hazards of asbestos was treated in a different context. In *Lopez* the court referred to the superior knowledge question in the classical terms of cost of production, as well as noting the need for specific evidence to support this theory of liability:

> Since the government is entitled to presume that one who bids on a government invitation knows his own capabilities and ascertained he will be able to produce, and at what cost, it would be up to the contractor, complaining of a breach by non-disclosure, to produce specific information to back up his contention.

Lopez, 858 F.2d at 717. Raymark and Eagle-Picher had not met this burden. The court also presumed a factual situation that was not, apparently, refuted in *Lopez*:

> We must presume that government officials acted in good faith, the contrary not being alleged. Acting in good faith, they could not have knowingly exposed their own employees to undue asbestos hazards.

Id. at 717-18.

In this case, GAF has proffered factual support not provided in *Lopez*, pointing out that the government monitored the health hazards, knew of the significant health risk to which it knowingly exposed its employees, classified the results as a military secret, and released misleading public information in its stead. For purposes of summary judgment we must accept these allegations as true. The evidence adduced by GAF provides sufficient factual support for its position that the discrepancy in knowledge was significantly different from that before the court in *Lopez*, such that there was created a material issue of fact as to whether the government's knowledge was indeed different from that previously known to Ruberoid, and whether the government had an obligation

to disclose its knowledge to its contractor, when its silence subjected the contractor to increased liability risk.

B

The government argues that any withholding of knowledge by the Navy did not increase Ruberoid's cost of performance of the contract, and that any later cost to Ruberoid based on tort liability to employees of the Navy can not be subject to full or even partial indemnification by the government, on any theory based on the contractual relation between the Navy and Ruberoid.

GAF states, correctly, that this was not the holding of *Lopez*. The court in *Lopez* did not purport to decide, on the facts there at bar, a universal principle of Tucker Act law. Nor can I today define the precise line beyond which there would always be an obligation of the government to disclose information that it knows, or is charged with knowing, would reasonably affect the terms of the supply contract. On the facts alleged by GAF, such an obligation is not barred by operation of law. In simpler situations, the withholding of superior knowledge by the government, such that a contractor's costs of performance are increased, has been recognized as compensable under the Tucker Act. *E.g., Petrochem Services, Inc.* v. *United States*, 837 F.2d 1076, 1079 (Fed. Cir. 1988); *American Ship Bldg. Co.* v. *United States*, 228 Ct. Cl. 220, 654 F.2d 75, 79 (1981). Liability is not defeated by the fact that the contractor had knowledge or experience pertaining to the subject matter of the contract. In *J.A. Jones Construction Co.* v. *United States*, 182 Ct. Cl. 615, 390 F.2d 886, 890, 893 (1968), the government was held liable for the contractor's increased cost of performance because the government had classified certain information that affected the contractor's labor costs. In *Helene Curtis Industries, Inc.* v. *United States*, 160 Ct. Cl. 437, 312 F.2d 774, 777-79 (1963) the government had conducted research and obtained information that it did not disclose, on the need to grind the product; the Court of Claims held that the plaintiff was entitled to recover its increased costs of performance, stating:

> Although it is not a fiduciary toward its contractors, the Government—where the balance of knowledge is so clearly on its side—can no more betray a contractor into a ruinous course of action by silence than by the written or spoken word.

Id. 312 F.2d at 778. In *Hardeman-Monier-Hutcherson* v. *United States*, 198 Ct. Cl. 472, 458 F.2d 1364 (1972), the Navy had suppressed reports documenting its knowledge about adverse weather conditions, resulting in material delays in the performance of a contract, for which the government was held liable. *Id.* 458 F.2d at 1371-72. While these courts did not reach issues of consequential damages, neither are such damages excluded, as a matter of law, from consideration when there is a duty to disclose information known only to the government. Nor is recovery of litigation and settlement costs excluded, as a matter of law, where the breach of duty led to the litigation. See the Restatement (Second) of Contracts § 351 comment c (1981) ("The party in breach is liable for the amount of any judgment against the injured party together with his reasonable expenditures in the litigation, if the party in breach had reason to foresee such expenditures as the probable result of his breach at the time he made the contract.") In *Travelers Insurance Co.* v. *United States*, 493 F.2d 881 (3d Cir. 1974) the Third Circuit remanded for consideration of whether the government was required to indemnify the manufacturer of a seventy-seven foot tower for a $125,000 judgment awarded a government employee who fell from the tower, where the manufacturer had alleged that the government's specifications for the tower were defective and caused or contributed to the injury. The court stated:

> Evidence consistent with these allegations might show contractual responsibility of the defendant so that there would be a basis for recovery under an implied contractual right to indemnification.

Id. at 188.

When the factual record is viewed favorably to GAF, as it must be, the magnitude of the government's superior knowledge and the extent of its deliberate concealment raise a fresh issue, not considered in *Lopez*. If the facts are found to support an obligation to disclose the increased liability to which the Navy was exposing the manufacturer during performance of the contract, then the inferences on which the *Lopez* decision was based do not apply. Thus the extent of the government's knowledge, and the effect of the government's concealment, are material factual issues.

The asserted facts distinguish markedly from those cases wherein no obligation to disclose has been placed on the government. *See, e.g., T.F. Scholes, Inc.* v. *United States*, 174 Ct. Cl. 1215, 357 F.2d 963, 970 (1966) (no recovery where information withheld was merely analysis by government derived from data made available to contractors); *H.N. Bailey & Associates* v. *United States*, 196 Ct. Cl. 166, 449 F.2d 376, 382 (1971) (no recovery where relevant information was available through published textbooks and other scholarly works).

In this case, the Navy classified as a military secret its knowledge of asbestos hazards under the Navy's conditions of use. Whether the government had an obligation to disclose this knowledge to an experienced producer of asbestos cannot be answered as a matter of law. The obligation to disclose is partly dependent on what the knowledge is, and what would reasonably be expected of such a party, entering into a contract with another. *See, e.g., Milmark Services, Inc.* v. *United States*, 731 F.2d 855, 859 (Fed. Cir. 1984) ("the Government's duty [to disclose] must be considered in light of the circumstances"). The obligation of a party to a contract to disclose information that may affect the contract terms or its performance is reflected in various theories of contract law. GAF is entitled to the opportunity to develop facts that could support its theory that the government had an obligation to disclose certain knowledge to its contractor, and that the failure to do so incurred potential liability for breach. Thus, respectfully, I dissent from the summary disposition of this claim.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5079

GAF CORPORATION,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Judgment

ON APPEAL from the United States Claims Court.

in CASE NO(S). 287-83C

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED May 8, 1991 /s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

COSTS: Against, Appellant.

PRINTING:----------$458.64

TOTAL:----------$458.64

ISSUED AS A MANDATE: June 18, 1991

GAF CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

No. 287-83C.

United States Claims Court.

Feb. 12, 1990.

Paul A. Zevnik, Washington, D.C., for plaintiff. Sidney S. Rosdeitcher, David G. Bookbinder, William N. Gerson, Theodore F. Haas, and Robert N. Kravitz, Paul, Weiss, Rifkind, Wharton & Garrison, New York City, and Kaye, Scholer, Fierman, Hays & Handler, Washington, D.C., of counsel.

David S. Fishback, Washington, D.C., with whom were S. Michael Scadron, James C. Brennan, and Asst. Atty. Gen. Stuart M. Gerson, for defendant. J. Patrick Glynn, Director, Torts Branch, and Harold J. Engel, Deputy Director, of counsel.

OPINION

NETTESHEIM, Judge.

This case is before the court on defendant's motion to dismiss or for summary judgment. Plaintiff has opposed and argument has been held.

BACKGROUND

Plaintiff GAF Corporation ("plaintiff"), a manufacturer of asbestos products, sued the United States on May 5, 1983, for implied contractual indemnification for damages sustained as a

result of actions by or on behalf of shipyard workers to recover for injuries or death due to exposure to asbestos. The case proceeded in tandem with similar cases, ultimately eleven in all, filed by other asbestos manufacturers. By mid-1986 it had been decided that the cases would be tried serially. Plaintiff's was second in line. The first, a six-week trial, was scheduled to begin on March 16, 1987. On July 16, 1986, all the then-pending cases were reassigned to this judge.

Before the first trial began, this court certified to the Federal Circuit for expedited ruling an order dismissing three of the cases, including the case scheduled for trial, for lack of subject matter jurisdiction. *Keene Corp.* v. *United States*, 12 Cl. Ct. 197 (1987). The Federal Circuit did not act on the certification, although it was accepted. On the second day of trial, the appeals court deferred consideration of the order dismissing the case on jurisdictional grounds until the trial was completed. Following the merits decision in *Johns-Manville Corp.* v. *United States*, 13 Cl. Ct. 72 (1987), this court entered an order on November 4, 1987, staying all the remaining cases pending resolution of the post-trial appeals. The Federal Circuit affirmed the Keene order of dismissal for lack of jurisdiction in a decision styled *Johns-Manville Corp.* v. *United States*, 855 F.2d 1556 (Fed. Cir. 1988) (per curiam). The Federal Circuit simultaneously vacated the trial court's merits decision since jurisdiction had been found wanting. *Johns-Manville Corp.* v. *United States*, *vacated on jurisdictional grounds*, 855 F.2d 1571 (Fed. Cir. 1988) (per curiam).[1/] The remaining cases were stayed pending resolution of the petition for writ of *certiorari* concerning the Federal Court's jurisdictional ruling. *Certiorari* was denied on March 6, 1989, __ U.S. __, 109 S. Ct. 1342, 103 L. Ed. 2d 811 (1989).

This court then proceeded to consider whether the Federal Circuit's jurisdictional ruling applied to the remaining cases. In its opinion in *Keene Corp.* v. *United States*, 17 Cl. Ct. 146 (1989), *appeals docketed*, Nos. 89-1638, 89-1639 & 89-1648 (Fed. Cir.

[1/] Both plaintiff and defendant cite for substantive propositions the trial court's merits decision in *Johns-Manville Corp.* Reference is made to that opinion to the extent the parties have viewed it as instructive.

Aug. 2, 8, 1989), this court dismissed seven of the eight remaining asbestos cases for lack of subject matter jurisdiction. The eighth case, plaintiff's, was not dismissed in *Keene*. On September 15, 1989, defendant filed a motion to dismiss or, alternatively, for summary judgment contending that the claims in plaintiff's complaint were made in other cases and have been addressed and dismissed by other courts. The motion has been briefed pursuant to RUSCC 56 and seeks summary judgment, since the parties have presented—and the court has considered—extra-pleading materials in ruling on defendant's motion. *See* RUSCC 12(b).

After the Federal Circuit's jurisdictional ruling and before defendant filed the instant motion, the Federal Circuit issued binding precedent in *Lopez* v. *A.C. & S., Inc.*, 858 F.2d 712 (Fed. Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 3185, 3186, 105 L. Ed. 2d 694 (1989), which affirmed dismissal of similar complaints, *inter alia*, for failure to state a cause of action. The Federal Circuit's decision was unanimous among a special five-judge panel convened to rule on that test case. *See* 858 F.2d at 713. Although the standards governing summary judgment apply, it is useful to examine the four claims themselves in plaintiff's complaint and juxtapose them with similar claims that the Federal Circuit has addressed and found to be legally insufficient.

1. Plaintiff's first claim is for breach of an implied contractual warranty, arising from the Government's promulgation and enforcement of contract specifications for asbestos products, that the specifications written by the Government were for products that would be safe and could be used safely. The alleged breach occurred because asbestos products manufactured pursuant to those specifications resulted in injuries to individuals exposed to those products.

The first claim made by Eagle-Picher Industries, Inc. ("Eagle-Picher"), another manufacturer of asbestos products, in its third-party indemnification complaint in 18 suits seeking damages for injuries to shipyard workers arising from exposure to asbestos (*decided sub nom. Lopez* v. *Johns-Manville*, 649 F. Supp. 149 (W.D. Wash. 1986), *aff'd sub nom. Lopez* v. *A. C. & S., Inc.*, 858 F.2d 712 (Fed. Cir. 1988)), is essentially identical to plaintiff's first claim, adding only the allegation that Eagle-Picher's products

conformed to government-promulgated specifications. Raymark Industries, Inc. ("Raymark"), also a defendant in the *Lopez* cases, filed a third-party indemnification complaint claiming, *inter alia*, that the Government breached its implied warranty that asbestos products conforming to government specifications would be safe and could be used safely.

In affirming the district court's dismissal of *Lopez*, the Federal Circuit surveyed cases in which a warranty of specifications had been found and concluded that one can be implied in a supply contract only when the Government's design specifications tell the supplier "just how to do the job." 858 F.2d at 716. In respect of manufacturing asbestos products, the Federal Circuit declined to imply a warranty only upon evidence that "the government specified any characteristic at all in the merchandise it purchased...." 858 F.2d at 715. Rather, the manufacturers would have to show "whether the government specifications differed at all from those of private customers of Raymark and Eagle-Picher, or if they did, whether the difference related to the asbestos content of the material supplied." 858 F.2d at 715-16. Since Eagle-Picher did not make a sufficient showing that the Government's specifications were design, or "how the government could have supposed it needed to tell Raymark and Eagle-Picher how to make asbestos insulation, or how they needed to rely on such instructions," 858 F.2d at 716, any implied warranty running from buyer to manufacturer to indemnify for increased costs associated with the production of asbestos products would he implied in law and, therefore, not within the Claims Court's Tucker Act jurisdiction. *Id.*

Thus, to avoid the holding of *Lopez*, plaintiff in the case at bar must make a showing, sufficient to overcome defendant's summary judgment motion, that the Government had so far intruded itself into the manufacturing process that the specifications under which plaintiff manufactured its asbestos products could support an implied-in-fact warranty. Plaintiff must also make a showing that the asbestos products that it sold to the Government differed from its commercial products—such that the manufacture of plaintiff's commercial products did not put plaintiff on notice of the hazard inherent in the products sold to the Government.

2. Because the Government promulgated mandatory specifications for, encouraged development of, purchased, and had control of the conditions under which plaintiff's asbestos-containing products were used, plaintiff claims that the Government impliedly warranted that the specification and use of those products would not expose plaintiff to liability for damages. Plaintiff's second claim alleges that this warranty was breached due to the Government's failure to provide for safety of its shipyard workers or those of its contractors, failure to provide warnings of danger of asbestos exposure to shipyard workers and to plaintiff, failure to promulgate and enforce safety regulations, and failure to inform plaintiff of the intended use or misuse of their products.

The second claims of both Raymark's and Eagle-Picher's third-party suits in *Lopez* are identical in all essentials to plaintiff's reverse warranty claim. The Federal Circuit integrated its discussion of the reverse warranty and the warranty of specifications as two aspects of the same warranty: "that in specifying asbestos, the government made an implied warranty to sellers that its own use of the products would not expose the sellers to unforeseen defective product liabilities to persons who might be injured...." by them. 858 F.2d at 714. The existence of an implied reverse warranty therefore was rejected by the court on the same basis: To be enforceable, the warranty would have to be implied in fact; third-party plaintiffs had not adduced facts to support such an implication; moreover, the warranty alleged is outside the bounds of the existing case law. *Id.* at 716.

Pursuant to a order of this court entered on June 16, 1989, plaintiff by letter to the Deputy Director of the Justice Department's Torts Branch informed defendant that plaintiff did not intend to pursue the reverse warranty aspects of this second claim. However, aspects relating to the conditions under which plaintiff-manufactured asbestos products were used after purchase and to the Government's knowledge of those conditions were retained, since it is alleged that they "are relevant to and support GAF's First, Third and Fourth Claims for Relief." Letter of July 14, 1989, from Sidney S. Rosdeitcher to Harold J. Engel, at 1-2.

3. Plaintiff's third claim alleges that because the Government sold raw asbestos to plaintiff without warning of health

risks, the Government impliedly warranted that the asbestos was safe, merchantable, and fit for its intended purpose. This warranty allegedly was breached when the Government failed to reveal its superior knowledge of the health risks entailed in exposure to asbestos.

Various asbestos product manufacturers brought two third-party actions for indemnification against the United States in the District of Maine, one covering injuries growing out of exposures at private shipyards (Model Third-Party Complaint A) and the other out of exposures at Naval shipyards (Model Third-Party Complaint B). These suits, styled *In re All Maine Asbestos Litigation*, sought recovery of amounts the manufacturers had been required to pay to shipyard employees allegedly injured by asbestos exposure. The third-party complaints contain a claim that if it is established that the asbestos sold by the Government to third-party plaintiffs was not safe, then the Government breached its implied seller's warranty that the asbestos would be safe and fit for its purpose. (All Maine Model Third-Party Complaint "A" ¶25; Model Third-Party Complaint "B" ¶15.)

The late Judge Edward T. Gignoux of Maine ruled that this allegation did not state a claim over which Tucker Act jurisdiction could be exercised since, as there was no proof of an express undertaking that the asbestos sold by the Government was safe, any implied warranty of safety would be one implied in law. *In re All Maine Asbestos Litigation*, 581 F. Supp. 963, 972-73 (D. Me. 1984), *aff'd*, 854 F.2d 1328 (Fed. Cir. 1988) (Table). To make the requisite showing in the case at bar under the rationale of *All Maine Asbestos Litigation*, plaintiff would need to offer some evidence establishing that in its dealings with plaintiff the Government had manifested an intent to warrant the safety of the asbestos it sold. The Federal Circuit's affirmance in *All Maine Asbestos Litigation* was unpublished, and, pursuant to Fed. Cir. R. 47.8(c), it is not binding precedent on the Claims Court, except in respect of *res judicata*, collateral estoppel, or law of the case. However, Judge Gignoux's opinion, although not itself binding, is persuasive authority of another federal trial court considering the identical claim and is a decision to be reckoned with.

4. Plaintiff's fourth claim is based on the theory of implied contractual duty to reveal superior knowledge. Plaintiff contends that because the Government assisted it in developing asbestos products, promulgated specifications requiring the use of asbestos, and had actual knowledge of the health risks of exposure to asbestos, the Government acquired a contractual duty to reveal its superior knowledge of those risks which it breached by withholding that knowledge.

Neither the third-party complaints in *All Maine Asbestos Litigation* nor in *Lopez* make a comparable contract claim, but the issue was argued to the Federal Circuit in the *Lopez* appeal and discussed in that court's affirmance of the dismissal. *See* 858 F.2d at 718-19. The Federal Circuit held that asbestos manufacturers could not obtain a recovery from the Government under the doctrine of superior knowledge, since, even assuming, *arguendo*, that the Government possessed knowledge superior to that of the manufacturers, third-party plaintiffs did not meet their burden of showing that the Government was aware that the suppliers needed additional information. The appeals court was unwilling to extend the doctrine of superior knowledge to include a duty to inform an experienced asbestos product manufacturer that its products were defective since such an extension would be "judicial legislation." 858 F.2d at 718. To prevail in the Claims Court on this claim, plaintiff must show that the facts of its case fit squarely within the traditional bounds of a superior knowledge claim. Plaintiff must show that

> a contractor (1) undertakes to perform without vital knowledge of a fact that affects performance costs or [duration], (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information....

Lopez, 858 F.2d at 717 (citing *American Ship Bldg. Co.* v. *United States*, 228 Ct. Cl. 220, 654 F.2d 75 (1981)).

FACTS

The following facts are those that are material to defendant's motion and either undisputed facts as framed by defendant, *see* RUSCC 56(d)(2), or the version of events described by plaintiff in its Rule 56(d)(2) response. One of plaintiff's predecessor entities was the Ruberoid Company. During 1920-1930 Ruberoid acquired and merged into its operations several other companies which commercially produced and sold asbestos-containing products. One of Ruberoid's predecessor's was Eternit, Inc. Ruberoid defended against lawsuits in which plaintiffs alleged injuries from the manufacturing process engaged in by Eternit and arising from a variety of dusts, including asbestos, cement, silica, and lime. During this period Ruberoid also mined raw asbestos fiber.

Before the turn of the century, H.F. Watson Company, a manufacturing concern with plants in Erie, Pennsylvania and Chicago, Illinois, produced asbestos papers, millboard, and pipe coverings for pipe and boiler insulation. In 1929 H.F. Watson was merged into Ruberoid, which, the following year, began to operate H.F. Watson as a division of Ruberoid, continuing without interruption in production of such asbestos products. As early as 1928, Eternit, Inc., St. Louis, Missouri, a manufacturer of asbestos cement products, was soliciting the United States Navy's Bureau of Yards for the purpose of securing lists of asbestos cement products which could be sold to the Navy. In 1930 Ruberoid acquired a controlling interest in Eternit. Two years later Ruberoid had acquired the remaining capital shares of Eternit and consolidated the company's liabilities and assets. Thus, according to Ruberoid's own corporate history published in 1965, "[i]n 1930, the company became an important producer of mineral fiber (new designation for asbestos cement) building materials...."

As a result of the acquisition of Eternit, Ruberoid became a defendant in a number of lawsuits (at least 12) brought by Eternit employees in the mid-1930's alleging asbestos-related injuries due

to exposure to a variety of dusts, including cement, silica, lime, and asbestos dusts apparently created in the process of manufacturing of asbestos-related products. At least five of these suits were settled by cash payments to plaintiffs. At the quarterly meeting of Ruberoid's Board of Directors held on February 26, 1935, the president reported on those St. Louis lawsuits and contemplated steps to be taken with a view toward safe-guarding "ourselves against dust hazards." At the next quarterly meeting, however, the acting chairman reported "the difficulty in insuring ourselves against occupational diseases." Plaintiff took such steps to safeguard the workplace, and between the 1930's and the mid-1960's Ruberoid experienced only two similar workers' claims from any of its facilities.

With the advent of the National Industrial Recovery Administration in 1933, during the first phase of the New Deal, Ruberoid became a member of both the Asbestos Paper and Allied Products Division and of the Asbestos Cement Products Division of the National Industrial Recovery Administration's Asbestos Industry Code Authority. In this period Ruberoid was involved in discussions concerning licensing of patents within the context of the Asbestos Paper and Allied Products Division. On November 8, 1934, Ruberoid entered into an agreement with Johns-Manville Corporation licensing Johns-Manville patents Nos. 1,628,680 and 1,628,681. In addition, in 1936, Ruberoid took steps to enter into the mining of raw asbestos fiber, arranging for the purchase, through a subsidiary, of a mine belonging to Vermont Asbestos Corporation, in Eden, Vermont. The sales manager of that subsidiary, Vermont Asbestos Products Co., Inc., in a letter dated September 16, 1936, to an official of the Bureau of Mines of the Department of the Interior, characterized Ruberoid as a "national [manufacturer] of asbestos and asphalt roofing and building materials." He also described Ruberoid's actions in Vermont as facilitating "increase[d] production of Vermont asbestos" and the "furnish[ing] of a more complete line of the various shorter grades."

In its 1937 Annual Report, Ruberoid listed a net dollar sales volume of over $16 million. The net sales of the asbestos industry leader, Johns-Manville, for 1937 were just over $60

million. The report noted the production of asbestos products, including: Asbestos (chrysotile) fibers for boards, brake linings, cements, clutch-facings, felts, millboard, molded products, paints, papers, shingles and sidings, corrugated asbestos-cement sheets, flat sheets of asbestos cement, asphalt-impregnated asbestos felt, asbestos felt, asbestos cellular pipe coverings and blocks, asbestos cement, asbestos laminated pipe coverings, asbestos millboard, asbestos paper, asbestos roll-board, magnesia (85 percent) pipe coverings and blocks, asbestos boards, asbestos molded boards, asbestos felt base, and asbestos cement.

On June 4, 1941, Ruberoid provided the War Department with its RUBEROID Insulation Catalogue, in which it listed a wide range of its commercially available asbestos insulation products, including its asbestos-containing 85 percent Magnesia Sectional Pipe Covering, and a long list of commercial customers of its products. Although plaintiff marketed 85 percent thermal insulation products to the Government, plaintiff did not then manufacture them. Plaintiff did represent itself to the Government through this catalogue as capable of supplying such products.

In the period of June-August 1947, Ruberoid purchased from the Reconstruction Finance Corporation, a federally-owned and controlled entity, amounts of raw asbestos fiber for approximately $350,000.00. These contracts contained no express warranties whatsoever or disclaimers of any warranties.

Ruberoid continued in the business of mining raw asbestos fiber itself in Vermont. At a board meeting held on November 21, 1950, Ruberoid's chairman outlined a 1951 program for exploration, core drilling, and development of further Vermont properties. Several months later, on June 27, 1951, the Defense Minerals Exploration Administration (the "DMEA") of the United States Department of the Interior mailed Ruberoid an exploration contract, pursuant to which the Government provided Ruberoid with funds with which to explore for raw asbestos fiber. There is no allegation that this contract contained any warranties by the Government that the raw asbestos fiber mined as a result of Ruberoid's acceptance of this assistance would be safe for use in products the industry would produce. Based on Ruberoid's submission of statements of the work done, the Government agreed

to pay for 90 percent of the work, up to $64,400.40. At a corporate meeting held in October 1951, it was reported that Ruberoid's Vermont mine would produce 48,000 tons of fiber that year—an increase of 26 percent over the past year. Ruberoid intended to use about half of that amount in its own product manufacturing plants.

The DMEA/Ruberoid contract was entered into pursuant to the Defense Production Act of 1950, Pub.L. No. 774, 64 Stat. 798, 50 U.S.C. App. §§ 2061-2166. As the legislative history of that Act demonstrates, Congress deemed it necessary, in light of defense requirements occasioned by the outbreak of the Korean War, to facilitate, among other things, private "production of essential materials, including the exploration, development, and mining of strategic metals and materials." The United States assisted Ruberoid in developing additional asbestos reserves in order to induce Ruberoid to produce additional asbestos fiber to be used in products purchased by the United States for its defense needs.

DISCUSSION

1. *Summary judgment standards*

Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. RUSCC 56(c). Only disputes over material facts, or facts that might significantly affect the outcome of the suit under the governing law, preclude an entry of judgment. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct, 2505, 2510, 91 L.Ed.2d 202 (1986). A dispute about a material fact is genuine if the evidence would permit a reasonable jury to return a verdict in favor of the non-movant. *Id.* Defendant, as the moving party, has the burden of establishing that there are no genuine material issues in dispute and that it is entitled to judgment as a matter of law. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 321, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

As the party opposing the motion, plaintiff has the burden of providing sufficient evidence, not necessarily admissible at trial,

to show that a genuine issue of material fact indeed exists. *Celotex*, 477 U.S. at 322, 324, 106 S. Ct. 2548, 2553.

To create a genuine issue of fact, the non-movant must do more than present *some* evidence on an issue it asserts is disputed. The Court stated:

> [T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence [of the nonmovant] is merely colorable, or is not significantly probative, summary judgment may be granted.

Avia Group Int'l, Inc. v. *L.A. Gear California, Inc.*, 853 F.2d 1557, 1560 (Fed.Cir. 1988) (emphasis in original) (quoting *Anderson*, 477 U.S. at 249-50, 106 S. Ct. at 2510-11 (citations omitted), and citing *Celotex*, 477 U.S. at 322-23, 106 S. Ct, at 2552-53, and *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986)). However, any evidence presented by plaintiff is to be believed and all justifiable inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 255, 106 S. Ct, at 2513-14. In resolving defendant's motion, the court cannot weigh the evidence and determine the truth of the matter on summary judgment. *Id.* at 249, 255, 106 S. Ct. at 2511, 2513. Uncontested material facts have been found consistent with the rule that, in respect of any facts that may be considered as contested, plaintiff, as the opponent of summary judgment, is entitled to "all applicable presumptions, inferences, and intendments." *H.F. Allen Orchards* v. *United States*, 749 F.2d 1571, 1574 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818, 106 S. Ct. 64, 88 L. Ed. 2d 52 (1985).

Summary judgment pursuant to RUSCC 56 properly can intercede and prevent trial if defendant can demonstrate that trial would be useless in that more evidence than is already available in connection with its motion could not reasonably be expected to change the result. *Pure Gold, Inc.* v. *Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626 (Fed. Cir. 1984). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut but,

rather, as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action....'" *Celotex*, 477 U.S. at 327, 106 S. Ct. at 2555 (quoted in *Avia Group Int'l*, 853 F.2d at 1560, and *Sweats Fashions, Inc.* v. *Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987)).

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex, 477 U.S. at 327, 106 S. Ct, at 2555; *see also Universal Life Church, Inc.*, v. *United States*, 13 Cl. Ct. 567, 580 (1987) (citing cases), *aff'd*, 862 F.2d 321 (Fed. Cir. 1988) (Table). A trial court may deny summary judgment, however, if "there is reason to believe that the better course would be to proceed to trial." *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513 (citation omitted).

The court's review of the materials presented on summary judgment reveals that plaintiff has not put forth sufficient evidence to constitute a genuine issue of material fact. In opposing defendant's summary judgment motion, plaintiff was required to come forward with that quantum of evidence. Moreover, the court in its discretion can find no justification for a trial on the issues raised by defendant. Although plaintiff put forward some allegations different than those in *Lopez*, the outcome is not affected when *Lopez* squarely reaches plaintiff's claims. For example, plaintiff attempts to distinguish itself from the asbestos manufacturers in *Lopez* by alleging that it both sold raw asbestos fiber to the Government and that the Government gave plaintiff financial assistance to develop domestic sources of raw asbestos fiber. However, in respect of its claim to a warranty of specifications, plaintiff has not made a showing that the asbestos insulation products it sold to the Government differed in any

material respect from those it sold to its commercial customers. *See* note 2 *infra*. Moreover, according to *Lopez*, the crux of an actionable superior knowledge claim is a showing by a contractor that the Government has reason to believe that a contractor was not already knowledgeable. Plaintiffs additional averments do not constitute such a showing.

2. *Plaintiff's showings under the holdings in Lopez*

Defendant's moving brief accurately capsulated the holdings in *Lopez*. The Federal Circuit in *Lopez* restated the well-established principle that to establish Tucker Act jurisdiction a claimant must allege the violations of either the express terms of a contract or of a contractual obligation implied-in-fact; an implied-in-law obligation does not state a claim under the Tucker Act. 858 F.2d at 714-15. It also noted that "it is not now contended that the contracts or purchase orders contained any written warranties to sellers...." *Id.* at 714. Thus, the question was whether an implied-in-fact obligation could be discerned. The court held that only where the "circumstances strongly supported a factual inference that a warranty was implied...." had the courts found such an obligation, *id.* at 715, and concluded that there were no such circumstances alleged. *Id.* at 716.

The Federal Circuit agreed with the district court that "an implied warranty relating to the use by the buyer after delivery, and warranting it would not harm the seller is novel, and no reason is shown why anyone could have so supposed at the date of sale by any inference from the circumstances...." that such a warranty had been made. *Id.* The court's "appreciation of the bizarre and novel nature of the 'reverse warranty' here asserted, and its lack of support in the alleged facts or the court decisions," led it to conclude that "the Tucker Act does not provide means to enforce the alleged warranty here...." *Id.* at 716-17.

Noting that, under the Tucker Act, there were "limits on the scope of breach liability for nondisclosure of superior knowledge," the court denied the manufacturers' assertions that the Government should be held liable to them in contract on the theory

that the Government had failed to disclose superior knowledge regarding the hazards of asbestos. *Id.* at 717. The court stated that the Government "might reasonably suppose Raymark and Eagle-Picher knew enough about asbestos and its perils not to need to learn more about it from the government." *Id.*

Defendant also accurately poses the issues on summary judgment under *Lopez*:[2/] Whether plaintiff and its

---

[2/] Plaintiff, either through its counter-statement of facts or statement of uncontroverted facts not covered by defendant's statement filed pursuant to RUSCC 56(d)(2), raises a number of factual issues, disputed to be sure, that are not material.

1. Whether plaintiff and its predecessors were aware of the health risks posed by exposure to finished products containing asbestos.

Defendant contends that plaintiff, as a knowledgeable and experienced manufacturer and seller of asbestos products, was in the same position vis-a-vis the Government as that in which the *Lopez* court found Raymark and Eagle-Picher, *i.e.*, knowledgeable "enough about asbestos and its perils not to need to learn more about it from the government." 858 F.2d at 717. Plaintiff was on notice of the asbestos hazard in part because of suits flied against plaintiff's predecessors Eternit and Ruberoid by employees who claimed to have developed diseases as a result of exposure to asbestos dust. While not contesting that these suits were filed and admitting that some of them were settled, plaintiff submits that circumstances surrounding the suits were such as not to put plaintiff on notice that exposure to finished asbestos products in a shipyard setting posed a health risk. First, the pleadings in the suits did not single out asbestos exposure as the cause of harm (PPF 15), but, rather, alleged that exposure to "injurious, noxious mineral dusts containing asbestos, cement, silica and lime" had caused respiratory disease. However, plaintiff does not dispute that asbestos was identified as a causative agent, and the court has found accordingly. Second, those suits were brought by workers who were involved in the manufacturing of Eternit's and Ruberoid's products, whereas the injuries underlying the case at bar were to workers exposed to finished asbestos products cut and installed in ships. (PPF 15) Plaintiff does not emphasize whether the risk to health in the two situations was actually different, but presents support for the contention that plaintiff in fact may not have been aware that its products carried a health risk after they left the factory. (PPF 12-13)

(continued...)

[2/](...continued)

For example, Phillip S. Bettoli, who was employed by Ruberoid in 1945 as a research chemist and in 1967 when the company merged with plaintiff became its Technical Director of the Building, Industrial and Floor Product division, testified that he

> was not aware and to the best of my knowledge, no one at Ruberoid was aware, that finished asbestos products, such as insulation, presented any risk of asbestos-related diseases to users of such products, such as insulation workers. Until the 1960's I had never heard such a hazard discussed at Ruberoid or anywhere else.
>
> Affidavit of Phillip S. Bettoli, Nov. 10, 1989, ¶ 10. E.J. O'Leary, who was hired in 1930 by Ruberoid as a sales representative and who became president of the company in 1958, averred that, until the mid-1960's, he was unaware that exposure to finished asbestos products posed a health hazard. Affidavit of E.J. O'Leary, Nov. 9, 1989, ¶ 4.

To bolster its position that Ruberoid knew enough and needed no information from the Government about the risks of asbestos exposure, defendant points to two instances where members of the Ruberoid Board of Directors, in presentations to the full Board, expressed concern about dust diseases. Since the references are imbedded in discussions of internal company matters, they were arguably concerns about exposure of Ruberoid employees during the manufacturing process, as opposed to indicators of knowledge that exposure to asbestos products after they had left the manufacturer held any danger. However, plaintiff does not put forth a triable issue whether exposure to finished asbestos products constituted a hazard different in any way from exposure to asbestos in the manufacturing process. (PPF 13) *Lopez* drew no such distinction. 858 F.2d at 717 ("They [Raymark and Eagle-Picher] say the buyer owed them a duty to tell them their product was defective, intrinsically or as actually used. Such contention is new to the 'superior knowledge' doctrine and does not fit it at all well....").

2. Whether the Government had reason to know of plaintiff's lack of knowledge about the risk of exposure to finished asbestos products.

The *Lopez* court based its ruling that the facts before it did not support a breach for failure to reveal superior knowledge on an assumption only that the Government's knowledge was superior and on the presumption that the Government had no basis for believing that an experienced maker of asbestos

(continued...)

---

[2](...continued)
products needed to learn more about the mineral's inherent risks from its purchaser. *Id.* at 717. Plaintiff advances two factual contentions to distinguish itself from that presumption and to support its position that not only was it unaware of the risk posed by exposure to asbestos products, but that the Government had reason to know it lacked that knowledge. First, plaintiff delineates the evolution of medical knowledge of asbestos risks until 1964 and 1965 when two papers by I.J. Selikoff were published. Until then, the literature indicated that findings in manufacturing settings were not transferable to shipyards and that there were no clear indications of health problems resulting from use of finished asbestos products. (PPF 38-44) Second, plaintiff traces the medical studies done within and commissioned by the Governments that indicate a clear concern about the health risks of asbestos exposure (PPF 20-35), as well as several internal communications indicating an active effort to keep this knowledge from being available to labor groups. (PPF 24-25)

Plaintiff's contention, as summarized in a chart introduced during argument, is that *Lopez* should be restricted to its presumption that government officials knowingly could not have exposed their own employees to asbestos hazards, since Raymark and Eagle-Picher did not allege to the contrary. Thus, plaintiff characterizes its showing in opposing summary judgment as sufficient to show that "[t]he Government did knowingly expose its own employees to asbestos hazards." Exhibit A to Transcript of Proceedings, *GAF Corp.* v. *United States*, No. 287-83C (Cl. Ct. Jan. 5, 1990). The materials relied on by plaintiff, taken in their most favorable light, *i.e.*, that least favorable to the Government, indicate that the Government identified use (fitting and installation) of asbestos insulation products in its shipyards as posing a hazard in the work-place and identified this hazard, among others, for monitoring, correcting, and safeguarding against. Even if the issue was what the Government knew and not what it reasonably could have supposed that plaintiff knew, plaintiff's showing falls short of putting in issue whether the Government knowingly exposed its employees to asbestos hazards as opposed to the proposition that the Government was aware of asbestos hazards in the shipyards. Plaintiff's counsel at argument surmised that the result in *Lopez* would not control if discovery were to reveal a document showing that the Government in 1952 said, "'We now know that our asbestos workers are going to die and we know nobody knows that, but we are not going to tell anybody....'" Transcript of Proceedings, No. 287-83C, at 70 (Cl. Ct. Jan. 5, 1990). The Federal Circuit has instructed that "[s]ummary judgment need not be denied merely to satisfy a litigant's speculative hope of finding some evidence that might tend to support the complaint...." *Pure Gold, Inc.* v. *Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984) (citation omitted).

(continued...)

[2/](...continued)

3. Whether plaintiff's entry into production of Calsilite was at the behest of the Government. (PPF 8)

Defendant contends that in 1942 Ruberoid approached the Bureau of Ships of the United States Navy with a proposal to use its newly-developed Calsilite insulation material, which, Ruberoid stated, would be superior to its own 85 percent magnesia and other products for insulating "pipes, boilers and other equipment on ships being constructed by the U.S. Navy." According to plaintiff, in 1942 Ruberoid approached the Bureau of Ships in order to propose that the Navy consider ascertaining whether Calsilite met preexisting government design specifications.

The parties agree that in September 1942 the Bureau of Ships, at Ruberoid's request, authorized the testing of Calsilite insulation was sent a "commercial sample" of Calsilite insulation molded pipe covering for the test. In August 1943 the Navy informed Ruberoid that its products were approved for Navy use. Plaintiff posits that Ruberoid had never manufactured this product, did not do so until 1944, and did not do so for any other purchaser than the Government until 1949. In 1944 Ruberoid began to sell such materials to the Navy in contracts which contained no express warranties by the purchaser (the Government) regarding the safety of the products. Plaintiff alleges sales of Calsilite and other products during this period and for the next 27 years, but does not allege that any of the contracts contained such express warranties.

In response to defendant's contention that the formula for, and production of, Ruberoid's Calsilite insulation was initiated by Ruberoid, plaintiff presents evidence that the product was not sold commercially before it was presented to the Navy for testing for compliance with its specifications and that the product was developed specifically to meet existing Navy Specifications 32-I-3 (INT) and 32-P-8 (INT). Although the testimony of Mr. Bettoli to the effect that the Navy revised its specifications around Calsilite does not refer to the 1954 revision that plaintiff cites to support its contention, the court makes no finding on point, since the case is on summary judgment. Plaintiff further contends that Calsilite was Ruberoid's only product to use amosite asbestos. (PPF 7, 10) However, plaintiff does not make a showing that of the commercial asbestos-containing products that it manufactured only amosite was hazardous. *Lopez* requires such a showing. 858 F.2d at 715-16; *see Johns-Manville Corp.*, 13 Cl. Ct, at 124 (failure of proof that amosite fibers more dangerous than other asbestos fibers).

(continued...)

---

[2](...continued)

The issue whether Calsilite was developed around preexisting government specifications is disputed, but it does not impede a grant of summary judgment in defendants favor. This court ruled in *Johns-Manville Corp.*, consonant with precedent, that the asbestos manufacturer had failed to prove that the design specifications were devised and drafted by the Government. *See* 13 Cl. Ct. at 119-32. There was one specification, however, in whose development the manufacturer had not intruded itself and which was drafted by the Government. This product was only manufactured after the Navy issued the subject specification. This court held that the claim to a warranty of specifications failed because "the company's extensive manufacturing experience with asbestos felt products and its awareness of the hazards associated with asbestos overshadowed any guidance from, or reliance on Navy specifications that Johns-Mansville might have perceived." *Id.* at 132. The same reasoning precludes plaintiff's claim under *Lopez*.

Further, plaintiff makes showings that Ruberoid received active assistance from the Government in producing Calsilite in the form of tax amortization benefits for the purchase of needed equipment, approvals for such purchases that were needed during World War II, and following the War subsidization of Ruberoid's asbestos mining. (PPF 8) The parties disagree not on the fact that Ruberoid's exploration and mining were subsidized, but, rather, on its implications. Defendant uses the fact of governmental assistance, and the resultant increase in Ruberoid's production of asbestos, to bolster its contention that plaintiff was a major asbestos product producer and thus was not in any apparent need of information about the mineral from the Government. Plaintiff uses the fact of governmental assistance as evidence that plaintiff was encouraged to become a producer of products that complied with government-written specifications, but which were known by the Government to carry a substantial risk to health. Although the court cannot resolve conflicting evidence on summary judgment, the only conflict is the implication to be drawn from government subsidization. In view of *Lopez*'s holding that the dispositive issue is what the Government reasonably could suppose plaintiff knew, the implication plaintiff would ask the court to draw is immaterial.

4. Whether asbestos was required in insulation products in order to meet the Navy's specifications.

Plaintiff submits that in response to a request from the Navy, it attempted to develop a Calsilite substitute which would meet its specifications, but which either reduced or eliminated the use of asbestos. As a result of its efforts, plaintiff became convinced that, since the Navy would not make alterations in the specifications, they could not be met absent the use of asbestos. (PPF 6)

(continued...)

predecessors—all asbestos manufacturers—were experienced producers of asbestos-containing products, and whether the Government had no reason to think that it needed to tell plaintiffs how to make such products, particularly where the products sold to the Government were in no material respect different from those sold commercially. *See Lopez*, 858 F.2d at 716-18.

3. Plaintiff attempts to distinguish its case from *Lopez* in six particulars. First, plaintiff points out that the *Lopez* court

---

[2](...continued)
However, plaintiff has not made a showing that the amosite fibers in Calsilite—a type of asbestos that plaintiff had not used previously—were more dangerous than the asbestos plaintiff manufactured for its commercial customers. Since *Lopez* defines the issue of superior knowledge in terms of what the Government reasonably could have expected plaintiff to have acquired from its own experience with asbestos, 858 F.2d at 817, *see infra* note 3 (breach of warranty of specifications presumes Government's superior knowledge), plaintiff's point that the Navy's specifications required Calsilite is not material.

5. Whether the specifications for asbestos in insulation promulgated by the Navy were design type.

Plaintiff contends that the specifications under which it manufactured asbestos insulation were of the design type "because the Government explicitly mandated the precise and detailed physical characteristics of the resulting product." (PPF 3) However, it was held in *Johns-Manville Corp.* v. *United States*, 13 Cl. Ct. at 131, that specifications requiring conformance with certain standards or characteristics were not necessarily design type. Rather, the inquiry is the degree to which the manufacturer has options available in meeting the standards. Specifications are design only when "only one material or a certain composition will enable the product to meet the performance standards expressed in the specification." *Id.* at 131. This court in *Johns-Manville* found that the specifications in issue there were design, since it was persuaded that, under the circumstances, they required the use of asbestos. Plaintiff here contends that only an asbestos-containing insulation material would have satisfied 32-P-8 (INT) and 32-I-3 (INT). (PPF 5)

Defendant concedes for purposes of argument that design specifications are in issue, but urges that plaintiff does not put forward triable issues under *Lopez* as to plaintiff's knowledge of the asbestos hazard or as to whether the products sold to the Government differ in respect of the asbestos hazard from those sold commercially. Defendant's point is well taken.

accepted the trial court's finding that the specifications were performance type specifications. Although the lower court's finding was not appealed in *Lopez*, acceptance of that finding is implicit in a reading of the Federal Circuit's opinion. *See* 858 F.2d at 716. Second—a related point—the court in *Lopez* distinguished a construction contract "with its massive detail all prescribed by the owner," *id.* at 715, from a supply contract and underscored that a warranty of specifications should not be implied in the latter, "except one which exacts a like conformity to the buyer's presumption of detail." *Id.* Plaintiff provides evidence that the specifications for the asbestos insulation products supplied to the Navy meet the exceptional case. This court ruled in *Johns-Manville* the same specifications were in the circumstances design specifications and that a warranty would lie if the requisite proof were forthcoming that the design specifications were drafted by the Government. *See Johns-Manville*, 13 Cl. Ct. at 131. Defendant concedes for purposes of its motion that design specifications are in issue. *See supra* note 2. Therefore, *Lopez* applies to this case because its holdings pertain to claims based on a warranty of design specifications.

As its third basis of distinguishing *Lopez*, plaintiff quotes from the opinion:

> [The counsel for asbestos suppliers here] do not know and cannot tell us whether the government specifications differed at all from those of private customers of Raymark and Eagle-Picher, or if they did, whether the difference related to the asbestos content of the materials supplied....

Lopez, 858 F.2d at 715-16.

Plaintiff takes the position that Calsilite, see *supra* note 2, was a brand-new product made in accordance with preexisting government specifications and manufactured exclusively for the Navy from its inception and that it was not sold to any private customer until years later. Further, plaintiff contends that prior to making Calsilite for the Navy, Ruberoid never made any other product that met the specifications involved. As discussed more fully in note 2 *supra*, this is a disputed issue of fa but does not

foreclose summary judgment. This is because the issue is not whether Calsilite or any one product was sold to the Navy in response to government-drafted design specifications, but, rather, under *Lopez* whether plaintiff has put in issue its status as an experienced manufacturer of asbestos products, the manufacture of which rendered plaintiff knowledgeable as to asbestos hazards. Defendant has offered sufficient uncontroverted material facts that plaintiff stood in the same shoes as Raymark and Eagle-Picher in the Lopez case insofar as plaintiff's status as an experienced producer of asbestos-containing products. It is undisputed that plaintiff sold the Navy and its commercial customers 85 percent magnesia (whether plaintiff itself produced the product), and the Federal Circuit ruled that all forms of asbestos insulation are hazardous. 858 F.2d at 716; *see id* at 714.

Plaintiff also argues that

> More important, Ruberoid's experience in manufacturing other asbestos products would not disclose the design defect involved in this case—the hazard of finished insulation products to shipyard workers. The Government's experience as owner and supervisor of shipyards and employer of shipyard workers is far more relevant than Ruberoid's experience as a manufacturer.

See Plf's Exhibit A to Transcript of Proceedings, *GAF Corp.* v. *United States*, No. 287-83C (Cl. Ct. Jan. 5,1990) (hereafter cited as "Plf's Ex. A"). The weakness in this argument is that the Federal Circuit has rejected plaintiff's statement of the pertinent design defect. Although plaintiff says that it is not sponsoring a warranty that the product would be used in a safe manner, plaintiff's own formulation of the warranty reflects a use concept. For example, plaintiff frames the warranty, as follows: "These specifications were defective simply because the asbestos insulation products produced in conformity with them were hazardous to shipyard workers." Plf's Br. filed Jan. 5, 1990, at 5. Similarly, "[t]he government has not offered any evidence that this

activity [installation of pipe covering in Ruberoid facilities] gave rise to any injuries or gave Ruberoid any meaningful experience that would have put it on notice of hazards of finished asbestos products to shipyards insulation workers...." *Id.* at 3. Whereas *Lopez* identifies the asbestos hazard as asbestos itself, plaintiff insist that the hazard stems from finished insulation products to shipyard workers. *Lopez* rejects plaintiff's formulation:

> They say the buyer owed them a duty to tell them their product was defective, intrinsically or as actually used. Such a contention is new to the "superior knowledge" doctrine and does not fit it at all well. It does not deal, for example, with how the government is supposed to know the supplier of asbestos needs information about asbestos it does not have....

Lopez, 858 F.2d at 717.[3/]

Fourth, plaintiff points to the following passage of *Lopez*: "It is not shown how the government could have supposed it needed to tell Raymark and Eagle-Picher how to make asbestos insulation, or how they needed to rely on such instructions." *Id.* at 716. Plaintiff argues that the defect in the specifications—the hazards posed by finished asbestos products to shipyard workers was one that the Government could not have supposed that Ruberoid knew. Plaintiff contends that the medical community was ignorant of this danger, *i.e.*, the danger of finished asbestos products, in contrast to the danger in the manufacturing setting, and

---

[3/] Although the Federal Circuit was discussing the Government's duty to reveal superior knowledge, the cause of action for breach of the implied warranty of government-designed specifications requires that the Government must have equal or greater knowledge of the defect than the contractor in order for the Government to be held responsible for drafting specifications. *Bethlehem Corp.* v. *United States*, 199 Ct. Cl. 247, 254, 462 F.2d 1400, 1404 (1972). Later the Court of Claims characterized the relative knowledge component, as follows: The Government was aware that the contractor had "no knowledge of and no reason to obtain" "vital information" that affects performance costs. *American Ship Bldg. Co.* v. *United States*, 228 Ct. Cl. 220, 225, 654 F.2d 75, 79 (1981).

that, therefore, Ruberoid's experience as a manufacturer was not relevant to appreciation of this hazard. As stated previously, *Lopez* rejected plaintiffs formulation of the pertinent warranty. Plaintiff's other arguments on this point flow from its premise and are without merit.

Fifth, plaintiff draws on the language of *Lopez* that "[t]he government might reasonably suppose Raymark and Eagle-Picher knew enough about asbestos and its perils without the need to learn more about it from the government...." *Lopez*, 858 F.2d at 717. *Lopez* stated that the superior knowledge doctrine "does not deal, for example, with how the government is supposed to know the supplier of asbestos needs information about asbestos it does not have." *Id.* In response to these statements from *Lopez*, plaintiff argues,

> Since the Government conducted classified studies on health conditions in the shipyards and never disclosed the hazards even to the workers exposed to them, and since the medical community did not view finished products as a hazard to users at the time, the Government could not reasonably suppose Ruberoid knew about the risk of disease to shipyard workers exposed to finished products.

Plf's Ex. A. Once again, *Lopez* does not acknowledge plaintiff's formulation of the warranty. Moreover, plaintiff cannot claim that Raymark and Eagle-Picher argued for a different warranty so that, somehow, *Lopez* may be read as allowing a distinction between diseases arising from the manufacture of asbestos products and the risk of diseases to shipyard workers exposed to finished products. Raymark and Eagle-Picher manufactured finished asbestos products of the same type as plaintiff and its predecessors.

Sixth, plaintiff cites dictum in *Lopez*:

> We must presume that government officials acted in good faith, the contrary not being alleged. Acting in good faith, they could not have

> knowingly exposed their own employees to undue asbestos hazards 858 F.2d at 717-18. Plaintiff rejoins: "The Government did knowingly expose its own employees to asbestos hazards." Plf's Ex. A. The court elsewhere has pointed out that the evidence offered by plaintiff on summary judgment does not precisely support plaintiffs statement. *See supra* note 2. However, even if it did, nothing in *Lopez*'s decision suggests that the existence of a genuine issue of fact on point would fall outside the scope of its holding. Immediately following the quoted language, the *Lopez* court rejected the concept of the duty of the customer to inform the supplier that the latter's product was defective when the supplier is an experienced producer of asbestos products. In addition, the dictum, if treated with any more significance than an aside, would not be consistent with *Lopez*'s holding that warranty of specifications does not reach actual "use." 858 F.2d at 716.

Plaintiff is troubled by the Federal Circuit's later holding in *Blount Brothers Corp.* v. *United States*, 872 F.2d 1003 (Fed. Cir. 1989), which appears inconsistent with *Lopez*. In that case the court upheld the warranty of specifications in favor of an experienced construction contractor—with more expertise in gravel than the Government—when the Government insisted that plaintiff use one aggregate with a specific composition and the contractor could not supply it. The Federal Circuit held that the contractor's inability to find a source—and the Government could not, as well—resulted from defective specifications.

This case is distinguishable from *Blount* on two grounds. First, the nature of the increased costs of performance, which the contractor in *Blount* was awarded because the contract could not be successfully completed, differs. In *Johns-Manville* this court rejected third-party liabilities as within the contemplation of costs of performance in connection with supply contracts. *See* 13 Cl. Ct. at 159-61; *Johns-Manville Corp.* v. *United States*, 12 Cl. Ct.

(1987) (opinion on motion for judgment on the pleadings). Relief measured by the monetary consequences of the failure of a building to function as designed due to the passage of time and not due to the subsequent actions of an actor, even if the defect is discovered years after the construction is completed, *see Poorvu* v. *United States*, 190 Ct. Cl. 640, 420 F.2d 993 (1970), represents the outer limits beyond which costs of performance have not been taken. Judicial recognition has not been extended to the notion that a supply item produced according to specifications in a satisfactory manner, yet causing damages due to its use, can be the basis of a claim to recover damages as costs of performance. Second, it is important to note, as defendant points out—as did the court in *Lopez*—that the losses suffered by plaintiff were occasioned by its own tort liability, *viz.*, liability for failure to place warnings on its asbestos products. *See Lopez*, 858 F.2d at 717.[4/]

Defendant has established its entitlement to summary judgment under the standards of RUSCC 56(c), since it has established that plaintiff has no claim under Lopez based on the warranty of design specifications or the failure to reveal superior knowledge. Correspondingly, plaintiff has failed to raise a genuine issue of material fact requiring trial on the issue of whether plaintiff can take its case outside *Lopez*. Unquestionably, plaintiff offers some evidence that distinguishes its case from *Johns-Manville*; however, it does not make the requisite showing in respect of Raymark's or Eagle-Picher's cases in *Lopez*; and *Lopez*, not *Johns-Manville*, is the precedent that Plaintiff must overcome. Plaintiff's case has been evaluated under the standards for summary judgment. *Lopez* addressed a motion to dismiss complaints for failure to state claims. Notwithstanding the different posture of the cases, the

---

[4/] The Federal Circuit in *Lopez* also was of the view that the Supreme Court's decision in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988), undermines the asbestos manufacturers' claims, since, if the Government and the manufacturers were so intimately involved in specifying and producing asbestos products, the manufacturers should have been able successfully to invoke the government contractor defense. This discussion was not essential to the *Lopez* holdings that control in this case. However, defendant's briefing on this point sufficiently demonstrates that the Federal Circuit's discussion applies to plaintiff's case, as well.

Lopez holdings would apply even if the matter were being reviewed after trial, to the extent that *Lopez* states legal propositions that are not limited to the nuances of the complaints in review in that case.

3. *Plaintiff's claim based on warranty of merchantability and fitness*

Plaintiff's third claim for relief is styled as "a Breach of Implied Warranty in the Sale of Raw Asbestos by the United States." Plaintiff avers:

> In selling raw asbestos to GAF without warning or caution, the United States impliedly warranted that such raw asbestos was safe, merchantable, and fit for its intended purpose. GAF reasonably relied on this implied warranty in purchasing raw asbestos from the United States and in producing thermal insulation products containing this asbestos for the United States.

Compl. filed May 5, 1983, ¶ 60. Plaintiff grounds its warranties in the Uniform Commercial Code.[5/] As to merchantability, UCC § 2-314 provides:

> (1) Unless excluded or modified..., a warranty that the goods shall be merchantable is implied in any contract for their sale if the seller is a merchant with respect to goods of that kind...

UCC § 2-315 establishes a warranty of fitness:

> Where the seller at the time of contracting has reason to know any particular purpose for which

---

[5/] There is no dispute that the UCC was not promulgated until 1951 and that the Uniform Sales Act contained provisions identical to UCC §§ 2-314 and 2-315. *See* Uniform Sales Act § 15, *reprinted in 8 Williston on Contracts* § 981 (3d ed. 1964).

> the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified... an implied warranty that the goods shall be fit for such purpose.

Judge Gignoux in *In re All Maine Asbestos Litigation*, 581 F. Supp. 963, 973 (D. Me. 1984), *aff'd*, 854 F.2d 1328 (Fed. Cir. 1988) (Table), characterized this type of warranty as an obligation implied in law and consequently dismissed the claim. A contractual warranty implied in law cannot be asserted against the United States. *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 & n.5, 100 S. Ct. 647, 650, & n.5, 62 L. Ed. 2d 614 (1980); *Lopez*, 858 F.2d at 714-15. Plaintiff attempts to distinguish *All Maine Asbestos Litigation* on the ground that the contracts of the asbestos product manufacturers in that case contained express disclaimers of any warranties. Defendant responds that in *All Maine Asbestos Litigation*, as in this case, the contracts contained no express warranties. Plaintiff has made no showing upon which to predicate any understanding to support a warranty implied-in-fact. Moreover, the undisputed facts material to this question reveal that plaintiff was an experienced miner of asbestos since 1936, eleven years before the Government began to sell raw asbestos to plaintiff. UCC § 2-315 predicates its warranty on a finding that plaintiff was relying on the Government's skill or judgment to select asbestos fibers to sell to it. Plaintiff as an experienced miner of asbestos fiber is not in a position to invoke this warranty, even if it could be construed as other than one implied in law. Accordingly, defendant has established its entitlement to summary judgment on this claim, and plaintiff has not offered any factual showing to defeat a grant of the motion.

CONCLUSION

Based on the foregoing, defendant's motion for summary judgment is granted. The Clerk of the Court shall dismiss the complaint.

IT IS SO ORDERED.

No costs.

IN THE UNITED STATES CLAIMS COURT

FILED
Feb. 22, 1990
U.S. Claims Court

No. 287-83C

GAF CORPORATION,

Plaintiff-Appellant,

v.

JUDGMENT

THE UNITED STATES,

Defendant-Appellee.

Pursuant to the opinion of February 12, 1990, granting defendant's motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

Frank T. Peartree

Clerk of the Court

February 22, 1990 By: Linda A. Eddins
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Filing fee is $105.00.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5079

GAF CORPORATION,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

ORDER

Before RICH, Circuit Judge, NEWMAN, Circuit Judge, RADER, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on June 18, 1991.

FOR THE COURT,

Dated: June 11, 1991

/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

cc: SIDNEY S. ROSDEITCHER
DAVID S. FISHBACK

GAF CORP. v. US, 90-5079
(CLM - 287-83C)

Note: Pursuant to Fed. Cir. R. 47.8, this order is notcitable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5079

GAF CORPORATION,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

ORDER

A suggestion for rehearing in banc having been filed in this case, and a response thereto having been invited by the court and filed, and a reply with opposition having been filed with leave,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT,

DATED July 30, 1991

/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

cc: SIDNEY S. ROSDEITCHER
DAVID S. FISHBACK

GAF CORP. v. US, 90-5079
(CLM - 287-83C)

Note: Pursuant to Fed. Cir. R. 47.8, this order is not citable as precedent. It is a public record.

Supreme Court of the United States

No.

A-75

GAF CORPORATION,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 9, 1991.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 26th
day of July, 1991.
